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FILED

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No. 99-

IN THE

Supreme Court of the United States

ANTHONY VOLENTINE, ET AL.,

Petitioners,

v.

BECHTEL, INC. AND MOBIL CHEMICAL CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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May 9, 2000

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QUESTION PRESENTED

Whether the mere filing of charges with the National Labor Relations Board automatically requires preemption of Petitioners' state law causes of action that arise out of the same occurrence by § 8 of the National Labor Relations Act.

PARTIES TO THE PROCEEDING

The plaintiffs in the district court (appellants in the court of appeals) were Anthony Volentine and three hundred and seven other individuals named below:

JOHN		ALLEN
REGGIE	C.	ALLEN
RUSSELL	H.	ALLEN
SHAWN	L.	ALLEN
MICHAEL		AMOS
HARRY	C.	ANDERSON
WILLIE		ANDERSON
JASON	W.	APODACA
ARTHUR	M.	ARNOLD, JR.
JOE	E.	ASHCRAFT
JERRY		ASHER
MERREL		AYCOCK
NORMAN	L.	BABINEAUX, JR.
CLARENCE	D.	BAKER
KEN		BAKER
MARK	R.	BAKER
CARLO		BALLARD
MICHAEL	J.	BAST
VERNON		BEARDEN
BRUCE		BEASLEY

RANDALL		BEDAIR
JACOB		BELANGER
CRYSTAL		BERTRAND
IRA	K.	BERTRAND
MICHAEL		BERTRAND
DONALD	E.	BIRD
GARY		BISCAMP
ARA	D.	BLACKWELL
TERRY	W.	BLOODWORTH
JEROME		BOB
RONALD	G.	BONIN
TROY		BOOKER
GLASTON		BOUDOIN
WILFORD	W.	BOUDREAUX
ALVERT	P.	BOUDREAUX, III
ALVERT	P.	BOUDREAUX, SR.
MARK	D.	BOWLING
KIRK		BRABHAM
VICTORIA		BRISENO
DAVID	R.	BROUSSARD
BRYCE	K.	BROWN
JEFFORY	W.	BROWN
JOSEPH		BROWN
RAYMOND	L.	BROWN
JERRY	E.	BRUNET
LEONARD		BRYANT
MONICA		BUCHANAN
JOHN	D.	BURROW
MICHAEL	G.	BURT
JOHNNY	R.	BURTON
JEROMY	C.	CADE
STEVEN	W	CAMPBELL
BRIAN	J.	CART
CHARLES	R.	CARTER
KENNETH		CHAMBLES
VANESS		CHAVIS
RICHARD		CHRISTMAN
RICKY		CLAYBROOK

LARRY	G.	COBB
WAYNE	B.	COBB
JESSIE		COLE, JR.
RANDALL	J.	COLLIER, SR.
ROLLAND	S.	CONEY
DOUGLAS		CORMIER
JOHN	P.	COURVILLE, JR.
VANITER		CRAFT
MIKE	A.	CRAFT, JR.
JAMES	T.	CREAMER
JOHNIE		CRYER
FRANK		CULPEPPER
GARY	L.	DARKINS
JERRY	J.	DAVILLE
JOHN	W.	DAVIS
FRED	A.	DEAN
GARY	P.	DEBBS
JOEY	R.	DESLATTE
RICHARD	M.	DICKMAN
DOUGLAS	C.	DIXON
STANLEY	J.	DOMINICK
MARTIN	A.	DONISI
RONALD		DOUGET
JOHNNIE	M.	DOYLE
RONNIE	M.	DOYLE
EDD	L.	DUBOIS
DONALD	G.	DUGAS
JOHNNY	I.	ELLIS
RICKY		ELLIS
JOHN		ENGLISH
MICHAEL	G.	ENTERLINE
JAMES	K.	FAIR
DAVID		FLORES
AUTRY	G.	FORD
DERRICK	L.	FORD
TOMMIE	L.	FREEMAN, JR.
ELVIN	R.	FUSELIER, JR.
ELVIN	R.	FUSELIER, SR.

HAROLD	W.	GARDENHINE, III
CHRIS		GARDENHIRE
KENNETH		GARNER
ALVIS	D.	GIVENS
ALEX		GLENN
EARL	W.	GOBBLE
PAUL	G.	GOMEZ, JR.
OSCAR	C.	GONZALEZ
LOUIS	O.	GRANGER
JIMMY		GRANGER, SR.
MARK		GRASS
ADAM		GREENWOOD
GEORGE	W.	GREER
DAVID	L.	GREIG
JOSE	F.	GUADARRAMA
BOBBY	G.	HALBERT
MARK	D.	HALL
MILBURN	H.	HALL
GENEA		HARALSON
GEORGE	M.	HARE
HOWARD	L.	HARRIS, SR.
MICHAEL	A.	HATCH
KEITH		HAYNES
COREY	T.	HEAD
EDDIE	M.	HEAD
JARED		HEAD
TYRA		HEMMENWAY
RENE'	A.	HERNANDEZ
SCOTT		HILTON
GARY	D.	HODGE
GREG		HOFFPAUIR
GREGORY	B.	HOFFPAUIR
JAMES	L.	HOLLAND
ALLEN	D.	HOWELL
MICHAEL	G.	HOWELL
DANA		HUBERT
ANTHONY	G.	JOHNSON
CURTIS	W.	JOHNSON

DAVID	E.	JOHNSON
FRED		JOHNSON
HARVEY		JOHNSON
GRALYNE	V.	JOHNSON, JR.
DANA		JONES
SHANNA		JONES
ISAAC	W.	JONES, JR.
JAMES		JOUBERT
GARLAND	R.	KANE
KENNETH	W.	KEEN, JR.
KENNETH	W.	KEEN, SR.
JOHN	C.	KELLEY
RUSSELL	J.	KENNEDY
JOHN	R.	KILLER
HAROLD	W.	KUEBODEAUX
KAREN	A.	LANDRY
JIMMY	J.	LAVERGNE
EDWIN		LEBLANC
LAWRENCE	J.	LEBLANC
RHONDA	A.	LEBLANC
GREGORY	L.	LEDOUX
P.	K.	LESTER
JERRY	L.	LEWIS
LONNIE		LEWIS
THOMAS	W.	LEWIS, SR.
JAMES	A.	LOBB
ROBERT	R.	LONG, JR.
ALEJANDRO	M.	LOPEZ
JEREMY	W.	LOWE
HENRY	J.	MADDOX
TOMMY	J.	MANN, SR.
BRUCE		MANSFIELD
RODNEY	D.	MANSFIELD
KATHY	H.	MARSH
LAWRENCE		MARSHALL, SR.
RANDALL	J.	MARTINDALE
RONALD	J.	MAYEA
RYAN	J.	MAYS

CRAIG		MCANALLY
MICHAEL	F.	MCCORD
ROGER		MCKEE
PATRICK		MIGUES
ROBERT	L.	MILLER
JOHN		MITCHAM
WILLIAM	T.	MITCHAM
DAVID	M.	MOAK
ERIC	G.	MOORE
ALTON	W.	MORGAN
KENNETH	R.	MORGAN
SHAUN	E.	MORGAN
RONALD	G.	MORRIS, SR.
BOBBY	L.	MORTON
MICHAEL	S.	MORTON
HAROLD	M.	MOSS
EUGENE	J.	MOUTON
HEATH		MOUTON
CODY	W.	MURPHY
PHILIP	R.	MURPHY, JR.
STEPHEN	E.	NESTER
JAMES	B.	NEWMAN
DELBERT		O'HAVER
ALBERT	A.	OCHOA
DAVID		OCHOA
JASON		ODOM
JIMMY		OSWALT
ROBERT	G.	PADON
BOBBY	D.	PARROTT
JOHNNY	T.	PARROTT
SCOTT	D.	PARROTT
HOWARD	K.	PAYNE
CLARENCE	J.	PEARSON
LARRY		PEDIGO
ROBERT	E.	PELFREY, JR.
GARY	D.	PHILLIPS
GEORGE	F.	PILLSBURG, JR.
CURTIS	D.	PRICE, JR.

DAVID	W.	PRINCE
BILLY	L.	PUCKETT
JIMMY	L.	PUCKETT
LINDA		PURDY
LOTTIE		PURDY
PRENTICE	C.	RAYMOND
JARROD	A.	REBERT
JASON	P.	REBERT
DUSTIN		REDMAN
MARY	L.	REDMAN
BILLY	D.	REED
DOUG		REEVES
KEVIN	P.	RESWEBER
ALVIN		RICHARD
FREDDIE		RITCHIE
PATRICE	C.	ROBERTSON
ROBERT	R.	ROLLANS
LYNN	R.	ROSE
SAMUEL		ROSETTE
RYAN	P.	ROTHENBERGER
JACKIE	N.	ROY
KELLY	V.	ROY
RUSTY		RUEDA
MARK		RUSSELL
JOSEPH	T.	SALTER
GUY	R.	SCOTT
LARRY	G.	SCOTT
BOBBY	J.	SHUGART
MELANIE		SHUTE
TROY	M.	SHUTTER
COREY	W.	SIMMONS
JOHN	A.	SINGLETARY
ROY	A.	SKAAR, JR.
BURNICE	R.	SMALL, JR.
DENNIS	D.	SMALLBONE
JOSEPH	F.	SMALLBONE, SR.
JACK	W.	SMITH
JAMES	A.	SMITH

RAYFIELD		SMITH
RONALD	W.	SMITH
STACY	W.	SMITH
PERRY	D.	SMITH, JR.
BRENDA		SOWELL
DALE		SOWELL
ROBIN	C.	SOWELL
TOMMY	W.	SOWELL
EDWARD	E.	SPIERS, JR.
WILLIAM	K.	SQUYRES
JAMES		STANLEY
JERRELL	T.	STANLEY
MASON	L.	STANLEY
LONNIE	R.	STEPHENSON
JASON	R.	STEVENSON
CLAUDIS		STEVENSON, JR.
DONALD	R.	STROTHER
ROSA	M.	STROY
WYLAND	F.	SYLVESTER
JOHN	D.	TALBERT
PAUL		TAUCER
JOE	M.	TENEYQUE
JOHN	E.	THERIOT, JR.
JEFFERY		THIBODEAUX
JEFFREY	L.	THIBODEAUX
PATRICK		TORIAN
GREG		TRAHAN
MOLLY		TRAHAN
LORON	E.	TRUETT
DONNA	S.	TURNER
GROVER	C.	TURNER
TRACY		VALDEZ
JOHN		VAN RANDEN
JOE	P.	VEZINA
ARNOLD	L.	VIZENA
ANTHONY		VOLENTINE
LARRY	S.	WALLER
DAVID	W.	WALLES

JOHN		WALLES
CHARLES	E.	WALTON
DEBRA	A.	WASHINGTON
DONALD	W.	WATSON
WILLIAM	E.	WATSON
GARLAND	D.	WEEKS
MITCHELL		WHITE
JOE	D.	WHITENER
DAVID	A.	WILLIAMS
STEVE	C.	WILLIAMS
TERRY	M.	WILLIAMS
HOWELL	C.	WILLIAMS, III
WILLIAM	E.	WILMOTH
RICHARD	K.	WINTER
C.	A.	WOMACK, SR.
JOHN	A.	WRIGHT
STEELE	A.	YAKUM
ROBERT		YORK
JERRELL		ZACHERE
DAMIAN		ZAMBARDINO
VALENTIN		ZAPATA
FRANKLIN	D.	ZERKO

The defendants below (appellees in the court of appeals) were Bechtel, Inc. and Mobil Chemical Company, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Anthony Volentine et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals (App. 1a-16a) is unreported. The memorandum and opinion order of the Eastern District Court of Texas (App. 17a-44a) is unreported.

JURISDICTION

Petitioners challenged the district court's exercise of subject matter jurisdiction although the court of appeals found that jurisdiction existed based on 28 U.S.C. § 1332. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 158 (referred to as § 8 of the NLRA) reads in relevant part:

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 157 of this title,...

(2) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization...

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of §159 (a) of this title.

29 U.S.C. § 157 referred to in § 8 above provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all of such activities except to the extent that such right may be affected by an agreement

requiring membership in a labor organization as a condition of employment as authorized in § 158 (a) (3) of this title.

STATEMENT OF THE CASE

This case involves what is commonly referred to as *Garmon* preemption. The important question presented to this Court is whether or not the filing of unfair labor relation charges with the National Labor Relations Board (hereinafter referred to as the NLRB) automatically precludes individuals who were represented by the unions filing such charges from also pursuing state law remedies implicated by the same conduct. The district court and court of appeals have so broadly interpreted *Garmon* preemption that members of labor unions will be denied access to state created causes of action just because they are members of collective bargaining units. This is not the resulted intended by the *Garmon* opinion or this Court. States' rights are implicated when, under the guise of Federal labor law, individuals are automatically denied remedies provided by state law merely because they are represented by a union. The interest of a unified Federal approach to management-labor relations does not dictate such an infringement on the rights of individual states to protect employees from unjustified interference with their employment.

This is not a typical labor law case. In fact, it is completely unlike any case in which this Court

has previously found *Garmon* preemption to apply. The Petitioners have no bargaining, employment or contractual relationship with either of the defendants. Petitioners are 308 individuals who were employed by C.A. Turner Construction Company, which is not a party to this case or the NLRB charges. Defendant, Bechtel, Inc. was the general contractor on Defendant's, Mobil Olefins Expansion Project and C.A. Turner was a subcontractor. After a dispute arose between C.A. Turner and Bechtel regarding cost over-runs on this project, Bechtel demanded C.A. Turner fire Petitioners by making false and misleading accusations against them. On April 13, 1998, Bechtel and Mobil instructed Petitioners' employer, C.A. Turner, to terminate its employment relationships by making false statements about them. C.A. Turner terminated Petitioners. When C.A. Turner proposed to re-hire Petitioners to complete the project, Bechtel and Mobil refused to allow Petitioners to be re-hired for this project and terminated C.A. Turner's contract.

Petitioners then sued Bechtel and Mobil for tortious interference with their employment, conspiracy to tortiously interfere with their employment, and for intentional infliction of emotional distress. Charges were also filed with the National Labor Relations Board by the interested unions. After removing this case to federal court and before discovery was completed, Bechtel and Mobil filed a Motion for Summary Judgment alleging *Garmon* preemption as a result of charges filed with the National Labor Relations Board by

Pipe Fitters Local Union No. 195 and the Texas Laborer's District Council and Laborers' Local 80 and the International Union of Operating Engineers, Local 450 (hereinafter referred to as the NLRB charges).

The district court and court of appeals erroneously characterize the filing of this lawsuit as occurring after the NLRB charges were investigated and dismissed. The lawsuit and charges were filed within days of each other and the wrongful conduct. (App. 51a-68a). This case was certainly filed before the NLRB investigated the union's charges. To characterize the Petitioners' pursuit of state-law remedies as a "second bite at the apple" or motivated as a result of "losing" before the NLRB is unfair. What happened was Petitioners as individuals chose to pursue a lawsuit for violations of state law while the unions that represented them simultaneously pursued whatever relief may have been available before the NLRB. The district court and court of appeals based all factual determinations solely on the limited investigation of the NLRB.

Procedural Background

Plaintiffs filed their original petition in Texas State District Court alleging state law causes of action for tortious interference with their employment relationship, conspiracy to commit tortious interference and intentional infliction of emotional distress. Plaintiffs alleged that the in-

terference was the result of Defendants' making false accusations against them. Plaintiffs never alleged that the interference resulted from their membership or participation in union activities. Defendants filed a joint Notice of Removal based on diversity of citizenship and federal question jurisdiction pursuant to the Labor Management Relations Act (hereinafter referred to as the "LMRA") 29 U.S.C.A. § 141 *et seq.* Defendants then filed a Motion for Summary Judgment alleging that Plaintiffs' state law causes of action are preempted by the LMRA pursuant to the *Garmon* preemption doctrine adopted by this Court. *San Diego Bldg. Trades Council, Local 2020* v. *Garmon*, 359 U.S. 236 (1959).

The district court granted summary judgment holding that *Garmon* preemption barred the Plaintiffs' state law causes of action. A judgment was entered against Plaintiffs on all claims. Plaintiffs then filed a Motion for New Trial requesting the district court to reconsider its ruling on the summary judgment and hear oral arguments. This request was denied and an appeal to the Fifth Circuit resulted. The Fifth Circuit affirmed the decision of the district court on February 9, 2000. Petitioners have timely filed this petition for writ of certiorari pursuant to Rule 13(1) of the Supreme Court Rules.

This Court's plenary power is urgently needed to resolve the direct conflict between the court of appeals decision made the basis of this petition and the decisions of this Court in *Local 926, In-*

ternational Union of Operating Engineers AFL-CIO v. *Jones*, 460 U.S. 669, 682, 103 S. Ct. 1453, 75 L. Ed. 2d 368 (1983) and *Farmer* v. *United Bd. of Carpenters*, 430 U.S. 290, 97 S. Ct. 1056, 51 L. Ed. 2d 338 (1977).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals decision that the motive of the alleged wrongful conduct is irrelevant amounts to automatic preemption of state law causes of action when unfair labor practice charges are also filed with the National Labor Relations Board. This is in direct conflict with authority from this Court.

Three hundred and eight individuals were denied fundamental, state created protection of their employment rights when their lawsuit was summarily dismissed. Neither the district court nor the court of appeals found compelling the disputed factual issue regarding what may have motivated the defendants to interfere with Petitioners' employment. The court of appeals found that the motive for the alleged interference would not alter its preemption analysis. As a result, the court affirmed the district court's summary judgment holding that "because we have determined that the district court's legal determination with respect to preemption was proper, so was its summary judgment determination." (App. 16a).

Such a ruling requires that all state law causes of action that would protect workers be preempted if the worker is also the member of a collective bargaining unit. If the motive for the alleged wrongful conduct is irrelevant for *Garmon* preemption analysis, then all controversies that arise out of the same occurrence would be identical enough to justify preemption. This result flies in the face of this Court's precedence. The Fifth Circuit has written a result-oriented opinion that misstates the facts of this case. In doing so, it has come in direct conflict with authority from this Court.

II. The Decision of the Court of Appeals Is Erroneous.

In the seminal case of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), the plaintiff unions filed an action in California state court that resulted in a judgment premised on unfair labor practices, albeit in the form of a tort based upon unfair labor practices defined by state law. The defendant filed a proceeding before the NLRB, which declined jurisdiction. In declining to exercise its jurisdiction, the NLRB did not define the status of the conduct for which California provided a remedy. This Court therefore enunciated a standard to determine whether state action was preempted — if the conduct for which the state provided a remedy was "arguably" within the compass of sections 7 or 8 of the NLRA. *Garmon* at 246. In determining that the conduct was arguably protected activity or prohibited conduct,

this Court observed that the state court case had been adjudicated on the assumption that the behavior of the unions constituted an unfair labor practice. (*Id.* at 245) Hence, preemption applied.

The test set forth in *Garmon* was further clarified in *Sears, Roebuck and Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978). The genesis of *Sears* was an action by Sears to enforce state trespass laws against picketers. Though the legality of the picketing was held to be arguably prohibited or protected by federal law, the only relief sought by Sears in the state proceeding related to the location of the pickets not the activity of picketing. The issue presented was whether the exercise of state jurisdiction over the location of the pickets, or the trespassory aspects of the conduct, interfered with federal policy. In holding that preemption did not apply, this Court observed: "[t]he critical inquiry . . . is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board." (*Id.* at 197) Simply stated, had Sears filed a charge with the NLRB, the controversy would have been different than the question of whether a trespass had occurred. The federal question would have been the legality

of the picketing, as opposed to the propriety of its location.

In summary, *Garmon* and *Sears* require court's to scrutinize the controversy pending before it to determine whether there is sufficient commonality or overlap with federal law to require preemption. The Fifth Circuit held that the NLRB charges and the lawsuit were fundamentally the same thus preemption is proper. In doing so, the court states that in the lawsuit, the plaintiffs claim "that the defendants forced C.A. Turner to fire them for taking en mass breaks." (App. 12a). However, this is not the basis of the state law claims and to imply so is erroneous. Petitioners' allegations never indicated that the inquiry would be whether or not the interference was the result of taking en mass breaks. The state law cause for tortious interference was based on the interference that resulted from the false accusations. The issue of taking an en mass break had nothing to do with the tortious interference claims and the inquiry in the state law claims would not require addressing this issue.

Petitioners have pleaded a viable cause of action under Texas law for tortious interference with their employment contracts. In *Sterner* v. *Marathon Oil Co.*, 767 S.W.2d 686 (1989), the Texas Supreme Court held that a cause of action exists for interference with a terminable at will employment contract unless the defendants can prove the legal defense of justification. The defendants did not move for summary judgment on the

grounds that no genuine issue of material fact exists as to an element of these causes of action, or that an affirmative defense has been established as a matter of law. Bechtel and Mobil predicated their motion for summary judgment solely on the legal issue of federal preemption.

Viewed through the prism of *Sears*, the controversy presented in Petitioners' state law claims is legally different than that which was presented to the NLRB. The district court and court of appeals seem to have placed undue emphasis on the existence of some common facts underlying both actions. If this were the test, then there would have been preemption in *Sears* and in every conceivable parallel proceeding. The only common facts are that the lawyers who represented the unions before the NLRB work at the same law firm as the lawyer who filed the state lawsuit and the alleged improper conduct happened on the same day. This is hardly sufficient to qualify as "identical controversies". The NLRB findings that there was no evidence of union animus or of an unfair labor practice do not as a matter of law negate Petitioners' state law causes of action. Texas law does not require a finding of unfair labor practices as an element of recovery for tortious interference with contract. Nor can it be said that an award of damages under such a theory would impinge upon any protected activity, especially in light of the NLRB finding that no unfair labor activity was implicated by the charges. The NLRB charges and this action are distinct and do not present identical controversies, as defined in *Sears*.

In *Windfield* v. *Groen Division, Dover Corp.*, 890 F.2d 764 (5th Cir. 1989) the Fifth Circuit reached a different result in a case with facts very similar to this case. In *Windfield*, the plaintiff sued his former employer for breach of contract and other theories in Mississippi state court. Groen removed the case to federal court and obtained dismissal on the basis of preemption.

The case arose out of a union election. Prior to the election, the employer provided Windfield a written guarantee of future employment, regardless of his involvement in the election. The union lost the election and he was fired. The union filed charges against Groen on the basis that the documents, representing the written employment guarantee, were an unfair labor practice. The NLRB found insufficient evidence to warrant further proceedings and then filed suit in state court.

As in this case, Windfield was accused of being a forum shopper, who, having failed to prevail before the NLRB, then sought relief in state court. The Fifth Circuit's analysis in reversing the district court's dismissal goes to the very heart of the issue in this case. The court observed that "the determination of potential interference [with federal policy] require[s] a more searching comparison than merely the factual bases of each controversy." (*Id.* at 768) While the Board had jurisdiction to determine whether the documents were an unfair labor practice under Section 8 of the NLRA, its only concern was whether the dis-

charge was motivated by union animus. The NLRB would not determine whether the documents constituted a contract under state law. Hence, while there were some common facts relevant to both proceedings, the NLRB and the trial court were not performing the "identical inquiry" proscribed by *Sears*. (*Id.* at 770)

Similarly, in this case, the NLRB only determined that there was no evidence that union animus caused the elimination of the en mass breaks and subsequent forced terminations. The NLRB did not determine, nor did it have jurisdiction to determine, whether, under Texas law, a cause of action exists for Bechtel and Mobil's wrongful interference with Petitioners' employment contracts by making false allegations.

In *Local 926, Intl. Union of Operating Engineers* v. *Jones*, 460 U.S. 669 (1983), this Court makes it clear that courts must examine the motives behind the unfair labor practices charges and those underlying the alleged wrongful conduct made the basis of state law claims. Jones specifically alleged in his suit that his non-union activity motivated his union to interfere with his employment relationship. This Court found that, if proved, such activity would violate the NLRA provisions forbidding unions from coercing an employee in his choice of his bargaining representative.

To interpret the filing of charges with the NLRB as an admission by the charging parties that the controversy is preempted by the NLRA would dis-

rupt the very federal scheme *Garmon* and its progeny seek to protect. In fact, other reasons exist for the prophylactic filing of charges. Stringent deadlines exist for the filing of charges with the NLRB. Section 10(b) of the NLRA provides a six month limitation from the date of the alleged unfair labor practice in which to file charges with the Board. Where there is even a possibility that the NLRA may apply because the conduct may have been motivated by union aminus, counsel and the unions are faced with a Hobson's choice. If they fail to file charges and the conduct is governed by the NLRA, they will face preemption in court and a time bar before the NLRB. The prudent course is to file both with the NLRB and in court and decide where jurisdiction lies after the motives for the conduct are fully investigated or subject to discovery. Petitioners should not be penalized for the exercise of prudence.

Moreover, even if the filing of charges does reflect the subjective belief of counsel that the NLRB may have jurisdiction, such belief is not determinative of jurisdiction, especially in a case where there may be other illegal or improper motives behind the interference that have nothing to do with Petitioners' union affiliation. Federal Rule of Civil Procedure, Rule 8 allows parties to plead in the alternative and to state as many separate claims as they may have "regardless of consistency" (subject to Rule 11, of course). This approach recognizes that especially early in litigation, a party may not have all the factual information it needs to determine what legal

rights may be implicated by the wrongful conduct. As happened in this case, the lawsuit and charges were filed within days of the interference and of each other before a full investigation by the NLRB or discovery had been conducted. This Court has never embraced an approach to preemption that gives preclusive effect to the mere filing of NLRB charges. To give such a preclusive effect to mere allegations made in NLRB charges when the Board has already determined the conduct did not violate the laws it was created to enforce has deprived Petitioners state remedies that were not designed to address labor issues. The court of appeals seems to ignore what motivated the *Garmon* decision — the risk of state interference with the federal regulatory scheme. Since there is no risk of state interference with the federal labor regulatory scheme in this case, *Garmon* preemption is not proper. Adoption of the logic of the court of appeals that the motive behind the improper state-prohibited conduct is irrelevant would guarantee disruption of uniform and proper preemption analysis pursuant to *Garmon*. Examination of motive is critical to proper preemption analysis, therefore; a thorough analysis of the factual issues must be completed to make a legal determination regarding whether the state law claims are barred. Summary judgment in this case was improper and robbed three hundred and eight individuals of their state employment rights.

The court of appeals was likewise in error when it held that the *Farmer* exception to *Garmon* pre-

emption does not apply to Petitioners' state law action for intentional infliction of emotional distress. The court of appeals construction of the exception to preemption for certain infliction of emotional distress claims recognized in *Farmer* v. *United Brotherhood of Carpenters Joiners of America, Local 25*, 430 U.S. 290 (1977), fails to recognize that Petitioners' claims in this suit do not turn on a finding of employment discrimination.

The court of appeals found that Petitioners' claims for emotional distress are based on "the actual firing, not the manner in which that firing occurred." (App. 15a). The court of appeals had to mischaracterize the Petitioners' allegations in their intentional infliction claims to find that the *Farmer* exception to *Garmon* preemption does not apply in this case. A fair reading of the Petitioners' allegations is that Bechtel and Mobil interfered with their employment by making false and misleading accusations against the Petitioners. Their claims for intentional infliction of emotional distress are based on the slanderous statements by the defendants. C.A. Turner, the Petitioners' employer, is the one who actually fired Petitioners as a result of the false accusations by the defendants. To hold that this case is distinguishable from *Farmer* by resorting to such a contorted reading of the Petitioners' allegations proves that the Fifth Circuit's decision was result-oriented. The decision of the court of appeals can not be allowed to stand as it directly conflicts with this Court's precedent.

The proper analysis, as clearly explained by this Court, is to examine the state law action for infliction of emotional distress and determine whether Petitioners must prove union animus or discrimination to recover. Petitioners would have to prove that in making the false statements the defendants' conduct was "outrageous". It is clear that they do not have to adduce evidence that the statements were motivated by union aminus. (App. 43a). The district court, like the court of appeals, ignores not only the motive behind the forced terminations but also behind the false statements. Further, Bechtel and Mobil did not move for summary judgment on the merits of an emotional distress claim. In this case, the application of the principles of *Garmon*, *Sears*, and *Farmer* illustrates that the Petitioners' state law claims should not be preempted.

III. The Question Presented is Important.

The federal interest in guaranteeing a uniform approach to labor-management relations requires that this petition be granted. This Court must also address the issue presented in this petition because it goes to the very heart of States' rights. A state can not adequately protect the very important interest of its citizens' employment rights if the principles of federal labor law guarantee certain individuals, those who are members of unions, will automatically be denied such protection. This result is absolutely contrary to the purpose and spirit of the NLRA and would undermine the Congressional intent behind the

NLRA. *Garmon* preemption was never intended to be so broadly interpreted as is evidenced by this Court's prior opinions.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 9, 2000

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APPENDIX A

U.S. COURT OF APPEALS
F I L E D
FEB 09 2000
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-41588

ANTHONY VOLENTINE; HARRY C. ANDERSON; JASON W. APODACA; ARTHUR M. ARNOLD, JR.; JOE E. ASHCRAFT; ET AL.,

Plaintiffs-Appellants,

versus

BECHTEL, INC.; MOBIL CHEMICAL CO.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Texas
(1:98-CV-1609)

Before JOLLY, EMILIO M. GARZA, and BENAVIDES, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:*

The 308 plaintiffs, construction workers and union members, were fired by C. A. Turner Contractors, their employer--allegedly because of pressure from the defendants Bechtel, the general contractor, and Mobil, the owner--when they took unauthorized, organized breaks specifically forbidden by orders of Bechtel. After losing their unfair labor practice charges before the National Labor Relations Board, the plaintiffs have now sued the defendants based on state law claims of tortious interference with contract, conspiracy to interfere with contract, and intentional infliction of emotional distress. The district court dismissed the complaint on summary judgment holding that the plaintiffs' claims were preempted under § 8 of the National Labor Relations Act. For the reasons that follow, we affirm.

I

In August 1996, Mobil began its Olefins Expansion Project in Beaumont, Texas. Mobil had hired Bechtel, Inc. as the general contractor, and Bechtel had hired Turner as a subcontractor for construction work. On April 9, 1998, Bechtel's construction site manager for the project, Sam

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Stoddard, sent a letter to its subcontractors, informing them that the company would no longer allow organized mass breaks or organized break areas because of alleged abuse of those breaks. Bechtel continued to allow for non-mass breaks necessary for worker safety, though Bechtel explained that the subcontractors would have to pay for that break time themselves.

On April 13, almost all of Turner's employees decided to disregard the order and continued their practice of taking mass breaks. Turner fired the employees taking the breaks that day. The plaintiff employees, however, did not surrender.

On April 14, Pipe Fitters Local Union No. 195 filed an unfair labor practice charge against Bechtel, alleging violations of § 8 (a)(1), (3), and (5) of the NLRA by "eliminat[ing] . . . established, organized work breaks" and discriminatorily terminating employees "because of their membership in and/or activities on behalf of their collective bargaining representative." On April 20, the International Union of Operating Engineers, Local 450, and the Texas Laborers' District Council and Laborers' 80 each filed the same charges against Bechtel. The charges were later amended to assert identical allegations against Mobil. After investigating these charges, the National Labor Relations Board refused to issue a complaint against Bechtel or Mobil.

After the failure of their NLRA claims, the 308 individual plaintiffs filed suit in Texas state court for tortious interference with contract, conspiracy to interfere with contract, and intentional infliction of emotional distress. In their interference

with contract claims, the plaintiffs charged that the defendants "willfully and intentionally set about to cause or force C. A. Turner Construction Company to terminate its contracts of employment with Plaintiffs."[1] The plaintiffs' intentional infliction claim merely asserted that this same tortious conduct had caused them to suffer emotional distress.

The defendants removed the case to federal district court and later moved for summary judgment. The court granted that motion on the grounds that § 8 of the NLRA preempted the state law claims. The plaintiffs appeal.

II

We must first determine whether federal jurisdiction is appropriate in this case. Because removal is an issue of statutory construction we review a district court's determination of the propriety of removal de novo. Vasquez v. Alto Bonito Gravel Plant Corp., 56 F.3d 689, 692 (5th Cir. 1995)(quoting Leffal v. Dallas Ind. Sch. Dist., 28 F.3d 521, 524 (5th Cir. 1994). We impose upon the removing [party] the burden of estab-

---

[1] The plaintiffs also alleged that the "[d]efendants set about to accomplish their objective by making false and misleading accusations against the Plaintiffs and disparaging the reputations of the Plaintiffs." Because these alleged activities were part of the alleged scheme to obtain the firing, we will not treat them as separate from the central allegation that the defendants forced the firing.

lishing the existence of subject matter jurisdiction. Id.

The district court allowed the defendants' removal motion based on federal question and diversity jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1332, though either ground would have been sufficient to establish federal jurisdiction. We begin with diversity.

There are two requirements for establishing diversity jurisdiction: (1) diversity of citizenship and (2) an amount in controversy over $75,000. 28 U.S.C. § 1332. Here, the defendants admitted citizenship in Nevada, California, New York, and Virginia. The defendants then asserted "on information and belief" that all 308 plaintiffs were citizens of Texas. The plaintiffs have failed to demonstrate that this was incorrect. Because unrebutted allegations of citizenship in a removal petition based on information and belief is sufficient to satisfy the removal statute, Jones v. Newton, 775 F.2d 1316, 1317-18 (5th Cir. 1985), the defendants have satisfied the first requirement for diversity jurisdiction.

With respect to the amount in controversy, damages are measured based on what is pled, not the relative likelihood of actually securing a particular award. See Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 353, 81 S.Ct. 1570, 6 L.Ed.2d 890 (1961); National Union Fire Ins. Co. of Pittsburgh v. Russell, 972 F.2d 628, 630 (5th Cir. 1992). When the complaint does not allege a specific amount of damages, the removing party must prove by a preponderance of the evidence that the amount in controversy exceeds $75,000.

Allen v. R&H Oil & Gas Co., 63 F.3d 1326, 1335 (5th Cir. 1995).[2] The court should first look to the complaint to determine whether it is "facially apparent" that the plaintiffs' claims are likely to exceed that amount. Id. At that point, jurisdiction is proper, unless the plaintiffs can establish that it is "legally certain" that the claim is for less than the jurisdictional amount. De Aguilar v. Boeing Co., 47 F.3d 1404, 1412 (5th Cir. 1995).[3]

It is apparent from the plaintiffs' Third Amended Complaint that they are suing individually rather than based on a single, common injury. For that reason, aggregation of actual damages among the various plaintiffs is not possible in order to meet the $75,000 requirement. Zahn v. International Paper Company, 414 U.S. 291,

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[2] Although the defendants' removal motion listed the amount in controversy as $50,000, we treat that as an oversight based on an old version of 28 U.S.C. § 1332. Regardless, it is the complaint that is important for determining the amount in controversy, not the defendants' removal motion.

[3] The De Augilar panel speculated about how a plaintiff might do so:

> Plaintiff's state complaint might cite, for example, to a state law that prohibits recovery of damages that exceed those requested in the ad damnum clause and that prohibits the initial ad damnum to be increased by amendment. Absent such a statute, "[l]itigants who want to prevent removal must file a binding stipulation or affidavit with their complaints."

De Aguilar, 47 F.3d at 1412 (quoting In re Shell Oil Co., 970 F.2d 355, 356 (7th Cir. 1992)(per curiam).

294-95, 94 S.Ct. 505, 508-09, 38 L.Ed.2d 511 (1973). Each plaintiff's claim must satisfy that amount for us to have diversity jurisdiction over his or her claims. Id.

In this case, the plaintiffs did not allege a specific amount of damages. Instead, they asserted

> a loss of income both in the past and in the future, the total destruction of their relationship with their former employer, C. A. Turner Construction Company, and devastating damage to their precautions within the market of their chosen trade. Plaintiffs have all been seriously damaged in their ability to secure alternative employment, resulting not only in loss of income and lost earning capacity, but in serious emotional distress and mental anguish occasioned by the loss of personal esteem resulting from their lack of work or opportunity to continue to work.

If proven, it would be reasonable to conclude that these damages would meet the $75,000 threshold, especially given the severity alleged.[4] The

---

[4] We are only concerned with actual damages and do not reach the as yet unresolved question in this circuit of whether punitive damages under Texas law may be aggregated in order to establish diversity jurisdiction. Compare Ard v. Transcontinental Gas Pipe Line Corp., 138 F.3d 596, 602 (5th Cir. 1998) (no aggregation under Louisiana law) with Allen v. R&H Oil & Gas Co., 63 F.3d 1326, 1332-35 (5th Cir. 1995)(aggregation under Mississippi law).

plaintiffs conceded as much in their Third Amended Petition: "This court has jurisdiction inasmuch as the amount in controversy exceeds the minimum jurisdictional limits of the court." Because the plaintiffs have made no attempt to establish that it is "legally certain" that the amount would be less, we believe that the plaintiffs' claims satisfy the $75,000 requirement, and that we therefore have diversity jurisdiction over these claims.

III

A

The plaintiffs next take issue with the district court's determination that § 8 Of the NLRA[5] Pre-

---

[5] Section 8(a) of the NLRA is codified at 29 U.S.C. § 158 and reads, in relevant part:

> It shall be an unfair labor practice for an employer--
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 157 of this title. . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 159(a) of this title.

Section 7, codified at 29 U.S.C. § 157 and referred to in § 8, reads:

> Employees shall have the right to self-organization, to form, join, or assist labor or-

empted their tortious interference with contract, conspiracy to interfere with contract, and intentional infliction of emotional distress claims under Texas law. Whether a claim is preempted is an issue of law that we review de novo. Windfield v. Groen Division, Dover Corp., 890 F.2d 764, 766 (5th Cir. 1989)(citing Vincent v. Trend Western Technical Corp., 828 F.2d 563, 569 (9th Cir. 1987).

B

In San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236, 245, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), the Supreme Court enunciated a rule of preemption for state law based claims that touched on areas covered by federal regulation under the NLRA:

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

---

ganizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in § 158(a)(3) of this title.

Garmon, however, provided for exceptions to this broad "arguably subject" test when the challenged conduct is a mere "peripheral concern" of federal labor law or touches "deeply rooted" local interests. Id. at 243-44. Subsequent cases have refined the Garmon preemption doctrine and these exceptions. The most notable of these cases is Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 280, 197-98, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978), where the Court held:

> The critical inquiry . . . is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to . . . that which could have been . . . presented to the Labor Board.

This case, however, was somewhat ambiguous because the court did not suggest the analysis for determining when "controversies" might be considered "identical."

During the 1983 term, the Court analyzed two separate cases using the Sears framework that provide useful guidance. In Local 926, International Union of Operating Engineers AFL-CIO v. Jones, 460 U.S. 669, 682, 103 S.Ct. 1453, 75 L.Ed.2d 368 (1983), the Court looked to whether the controversies were the same "in a fundamental respect." In that case, the plaintiff brought NLRB and state law claims charging that a union

had coerced his employer to fire him because he was not a member of that union in good standing. Because both controversies centered on whether a discharge was due to union influence, the state law claims were preempted. Id. In Belknap, Inc. v. Hale, 463 U.S. 491, 103 S.Ct. 3172, 77 L.Ed.2d 798 (1983), on the other hand, the court focused not just on the central essence of the two claims, but instead examined similarities in the factual bases of each, the interests each sought to protect, and the relief requested as part of each one. Id. at 510-11.[6]

Both of these cases have been important in Garmon preemption analysis in this circuit. See, e.g., Sheet Metal Workers Local Union No. 54, AFL-CIO v. E. F. Etie Sheet Metal Co., 1 F.3d 1464, 1470 (5th Cir. 1993) (relying on both standards); Hobbs v. Hawkins, 968 F.2d 471, 476 (5th Cir. 1992) (relying on the "fundamental respect" criterion); Windfield v. Groen Division, Dover Corp., 890 F.2d 764 (5th Cir. 1989)(discussing both standards).

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[6] In Belknap, the plaintiffs were replacement workers who sued their employer for misrepresentation and breach of contract, claiming that the defendant corporation had hired them as permanent employees but then fired them when it agreed to a contract with the striking union. The Court held that the claims were not preempted. NLRA claims arising from these facts would have raised only the rights of the strikers being infringed by the offer to the replacement workers. The state claim, on the other hand, was based on the rights of the replacement workers for damages irrespective of the rights of strikers. Moreover, reinstatement was not a remedy available under state law but was under federal law.

C

With each of these precedents offering some guidance, we turn to consider the claims for tortious interference with contract and conspiracy to interfere with contract that are before us. Thus, in Jones, 460 U.S. 669, we note that the Supreme Court held that state claims for tortious interference with contract can be preempted under the Garmon doctrine. On the same basis, claims for conspiracy to interfere with contract may also be preempted. But Jones does not stand for the proposition that either cause of action is always preempted.

We think that this case bears a close resemblance to Jones in that both the NLRB and state law claims are fundamentally the same. In the NLRB proceeding, the unions charged that Bechtel and Mobil had forced C.A. Turner to eliminate the breaks without consulting with the respective unions, and then to fire them for continuing to take those breaks. The plaintiffs made the same claim in state court--that the defendants forced C. A. Turner to fire them for taking en mass breaks. This issue is central to both claims and would be the focus of inquiry both before the NLRB and the court reviewing the state law claims.

Using the framework from Belknap buttresses the conclusion that the controversies are the same. Both controversies arise from the same set of facts--the defendants' alleged conduct in obtaining the fixing of C.A. Turner's employees.[7] The

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[7] The mere fact that the plaintiffs initially filed claims based on these same facts with the NLRB can be influential

interests in each action were the same--the right of the employees to keep their jobs after staging what amounted to an organized walkout. It is true that the remedies sought are somewhat different--back pay and other job-related losses, plus reinstatement in the NLRB action, and in the state law proceeding, damages, which would include economic losses plus non-economic-based damages. But that is frequently, if not always, the case in such preemption questions that involve administrative remedies as opposed to state court remedies. By itself, however, that is not enough to distinguish materially between the NLRB charges and the interference-with-contract claims. We thus conclude that the claims are essentially the same for purposes of federal preemption.[8]

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in finding preemption. That strongly suggests that the controversies are the same. See Parker v. Connors Steel Co., 855 F.2d 1510, 1517 (11th Cir. 1988)("By initially pursuing relief with the NLRB, the employees have implicitly recognized the Board's jurisdiction over their claims.")

[8] Another consideration determining whether this case falls within the ambit of the NLRA is the relationship between the defendants and plaintiffs. We believe that Bechtel, as a general contractor, and Mobil, as the ultimate employer, have a sufficient indicia of an employment relationship with the plaintiffs that their alleged conduct arguably falls under the NLRA. Given the nature of the work on the Mobil project, the plaintiffs' allegations as to the day-to-day influence that the defendants had over their work, the relationship between the plaintiffs as union members engaging in a partial strike activity to enforce a previous term of employment, and the defendants urging that they be fired for that activity, we conclude that their interaction arguably falls under the governance of the NLRA.

Just as with tortious interference claims, the NLRA may, based on the same rationale, preempt claims for intentional infliction of emotional distress. See Smith v. Houston Oilers, Inc., 87 F.3d 717, 721 (5th Cir. 1996). Courts have recognized, however, an exception to Garmon preemption when claims rest on extreme and outrageous conduct that is unrelated to an unfair labor practice:

> Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself

Farmer v. United Bd. of Carpenters, 430 U.S. 290, 305, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977) (footnote omitted). In Farmer, the plaintiff, a union member, alleged that the defendants, a union and union officials, had intentionally engaged in "outrageous conduct, threats, intimidation, and words' which caused [the plaintiff] to suffer 'grievous mental and emotional distress as well as great physical damage.'" Id. The plaintiff at-

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We have previously acknowledged that a contractor may be liable to its subcontractors, employees for anti-union actions even though it was not the proximate employer. See Texas World Svc. Co. v. NLRB, 928 F.2d 1426 (5th Cir. 1991).

tempted to prove that the union's campaign against him included "frequent public ridicule" and "incessant verbal abuse," although the opinion does not discuss exactly what he alleged occurred. The Court declined to preempt that state law claim. Instead, the Court held that the potential interference with federal concerns was minimal because the tort issue could be adjudicated without resolution of the underlying labor dispute. Id. What little potential interference there was insufficient to counterbalance the legitimate and substantial state interest in protecting its citizens. Id.

In this case, the plaintiffs' Third Amended Complaint established the tortious interference claim as follows:

> The conduct referred to above [in the sections setting out the tortious-interference and conspiracy-to-interfere claims) engaged in by Defendants is outrageous and was intended to inflict emotional suffering and distress upon the Plaintiffs. The above alleged tortious conduct [related to interference with contract] on the part of the Defendants did in fact cause the Plaintiffs to suffer from emotional distress and mental anguish.

The intentional infliction of emotional distress claimed here is itself the actual firing, not the manner in which that firing occurred. There is a strong potential for interference with federal law

for that reason. Thus, the Farmer exception does not apply, and the tortious interference claim is also preempted by federal law.

IV

We turn finally to the plaintiffs' contention that the existence of genuine issues of material fact should have prevented the district court from granting summary judgment on the issue of preemption. We can find no disputed factual issues, however, that should have prevented the district court from ruling on the defendants, summary judgment motion, nor have the plaintiffs pointed to any. Their one suggestion is that the "Defendants' motive for interfering with Appellants' employment contracts, was disputed. But that does not alter our preemption analysis. Whatever the motive prompting the defendants to seek the firings, the plaintiffs' state law and NLRB claims arise out of the same facts and at their core are essentially the same. Because we have determined that the district court's legal determination with respect to preemption was proper, so was its summary judgment determination.

V

For the reasons stated herein, the district court's decision is

AFFIRMED.

APPENDIX B

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U.S. DISTRICT COURT
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TX EASTERN BEAUMONT
BY /s/

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

	§	
ANTHONY VOLENTINE, et al.	§	
Plaintiffs,	§	
	§	
v.	§	1:98CV1609(TH)
	§	JURY
BECHTEL, Inc. and	§	
MOBIL CHEMICAL	§	
COMPANY, Inc.	§	
Defendants.	§	
	§	

MEMORANDUM AND OPINION ORDER

Before this Court is *Bechtel, Inc.'s and Mobil Chemical Company's Motion for Summary Judgment* [14]. Having considered the motion, the response, and the reply to the response, this Court hereby GRANTS *Bechtel, Inc.'s and Mobil Chemical Company's Motion for Summary Judgment* [14].

1. Facts

The autumn of 1996 brought together Bechtel, Inc. ("Bechtel"), Mobil Chemical Corporation--a division of Mobil Oil Company ("Mobil"), and some three hundred and eight (308) individual plaintiffs who bring this lawsuit. In August 1996, Mobil began work on its Olefins Expansion Project (the "Expansion Project") in Beaumont Texas. In order to complete the Expansion Project, Mobil hired Bechtel as the general contractor; and C.A. Turner Contractors ("C.A. Turner") came on board as a subcontractor. All three hundred and eight (308) plaintiffs in this lawsuit worked for subcontractor C.A. Turner at Mobil's Expansion Project.

April 13, 1998 was just like any other spring day in Beaumont, Texas. However, that fair, 60-degree day was anything but normal for the employees at Mobil's Expansion Project. In fact, when the day was said and done and the red-orange sun had vanished beneath the clouded horizon, some three hundred and eight (308) of C.A. Turner's employees were fired from Mobil's Expansion Project.

Fired for what? In fact, our story begins April 9, 1998, just a few days before the firing of the three hundred and eight (308) Plaintiffs. On April 9, 1998, Bechtel's construction site manger for the Expansion Project, Sam Stoddard, sent a letter to all Becthel subcontractors--including C.A. Turner --informing them that there would no longer be organized breaks or organized break areas because of the alleged abuse of breaks. Apparently, Bechtel determined that en masse breaks were,

quite logically, creating productivity problems. As a result, Bechtel decided to eliminate en masse breaks. However, Bechtel advised C.A. Turner that its employees could take breaks as needed, but C.A. Turner would have to pay from them.[1] C.A. Turner declined to pay for the breaks. When the employees took en masse breaks in contravention of Bechtell's directive, Bechtel terminated its contract with C.A. Turner which had the practical effect of firing C.A. Turner's employees from Mobil's Expansion Project. This lawsuit resulted.

2. Summary Judgment Standard

Rule 56(b) of the Federal Rules of Civil Procedure states: "A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Furthermore, Rule 56(c) states, in part: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Thus, summary judgment is proper when,

---

[1] Regardless, Bechtel encouragers employees at Mobil's Expansion Project to take breaks as needed for safety reasons--just not all at the same time.

after a reasonable period for discovery, one party is unable to show a genuine issue as to a material fact on which he will bear the burden of proof at trial, provided that judgment against him is appropriate as a matter of law. Nebraska v. Wyoming, 507 U.S. 584, 589, 113 S.Ct. 1689, 1694, 123 L.Ed.2d 317 (1993); Celotex, 477 U.S. at 322. The moving party need not negate the elements of the non-moving party's case. Id. at 323; Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994)(en banc)(citing Celotex, 477 U.S. at 323, and Lujan v. National Wildlife Fed'n., 497 U.S. 871, 888, 110 S.Ct. 3188-89, 111 L.Ed.2d 695 (1990)). Rather, the moving party need only "demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323.

The non-moving party does not overcome the absence of a genuine issue of material fact by simply "creating some metaphysical doubt as to the material facts," Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986), by making "conclusory allegations," Lujan, 497 U.S. at 871-73, by presenting "unsubstantiated assertions. Little, 37 F.3d at 1075, or by proffering only a "scintilla" of evidence. Id. When the non-moving party fails to make a sufficient showing on an essential element of his case, the moving party is entitled to a judgment as a matter of law. Id. Nonetheless, when considering a motion for summary judgment, the trial court must construe all evidence in the light most favorable to the non-moving party and resolve all doubts against the moving party. Eastman Kodak Co. v. Image Tech-

nical Servs., Inc., 504 U.S. 451, 456, 112 S.Ct. 2072, 2076, 119 L.Ed.2d 265 (1992). With this standard in mind, this Court now turns to the particular question before it—namely, whether Garmon and its progeny preempts this lawsuit.

3. Please, Don't Squeeze the Garmon

Defendants argue that Garmon and its progeny preempt all of Plaintiffs' claims because they lie within the exclusive jurisdiction of the National Labor Relations Board established by the National Labor Relations Act.[2] Specifically, Defendants claim that this entire lawsuit is preempted by Sections 7 and 8 of the National Labor Relations Act ("NLRA").[3] 61 Stat. 140, 29 U.S.C. §§ 157,

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[2] In 1935 Congress enacted the National Labor Relations Act commonly referred to as the "Wagner Act." In 1947, Congress amended this act by the National Labor Management Relations Act, commonly referred to as the "Taft-Hartley Act." This Court will use "NLRA" to refer to the National Labor Relations Act as amended by the National Labor Management Relations Act.

[3] Section 157 of the National Labor Relations Act reads, in its entirety:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition

> of employment as authorized in section 158(a)(3) of this title. 29 U.S.C. § 157 (1998).

Section 158 of the National Labor Relations Act reads, in part:

> It shall be an unfair labor practice for an employer—
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it;
> (3) by discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . 29 U.S.C. § 158 (1998).

There is yet a different type of preemption other than Garmon preemption—specifically, preemption under § 301 of the Labor Management Relations Act as described by Lingle v. Norge Div. of Magic Chef for matters touching upon the interpretation of a collective bargaining agreement. 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). In that case, the Supreme Court held "that an application of state law is preempted by § 301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a collective-bargaining agreement." Lingle, 486 U.S. at 413, 108 S.Ct. at 1885, 100 L.Ed.2d 410; see Thomas v. L.T.V. Corp., 39 F.3d 611, 616 (5th Cir. 1994) ("Preemption occurs when a decision on the state claim is inextricably intertwined with consideration of the terms of the labor contract or when the application of state law to a dispute requires interpretation of the collective-bargaining agreement"); Barrow v. New Orleans Steamship Assoc., 10 F.3d 292, 300 (5th Cir. 1994) ("The LMRA preempts state-law emotional distress claims if those claims are related to employment discrimination"). Since the present case does not call upon the interpretation of a collective-bargaining

158, 29 U.S.C.A. §§ 157, 158. With the creation of the NLRA, Congress established a "comprehensive amalgam of substantive law and regulator arrangements. . .to govern labor-management relations affecting interstate commerce." Local 926, Int'l. Union of Operating Engineers v. Jones, 460 U.S. 669, 675-76, 103 S.Ct. 1453, 1458, 75 L.Ed.2d 368 (1983). In San Diego Building Trades Council, Local 202 v. Garmon the Supreme Court noted the considerable deference afforded the NLRA by the courts: "[T]he unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." 359 U.S. 236, 242, 79 S.Ct. 773, 778, 3 L.Ed.2d 775 (1959). Thus, key to the NLRA--this "centralized administrative agency"--is its freedom from fragmentation by state-law causes of action intruding upon its broad jurisdiction. Realizing the need to protect this jurisdiction from such fragmentation, the Supreme Court in Garmon held:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair

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agreement, this Lingle-type preemption is not relevant to current discussion. For a recent case discussing the two different types of preemption—Garmon and Lingle—see Banfield v. Laidlaw Waste Sys. No. 05-96-01425-CV, 1998 WL 519485 (Tex.App.—Dallas, Aug. 24, 1998).

> labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law... *When an activity is arguable subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.*

359 U.S. at 245, 79 S.Ct. at 780, 3 L.Ed.2d 775 (emphasis added). The Supreme Court established this rule to prevent state-law distortion of well-developed, federal labor law. There is, as always, a loophole to this rule. "Under Garmon, a state may regulate conduct that is of only peripheral concern to the Act or which is so deeply rooted in local law that the courts should not assume that Congress intended to preempt the application of state law." Belknap v. Hale, 463 U.S. 491, 509, 103 S.Ct. 3172, 3182, 77 L.Ed.2d 798. That is, the "Court has permitted exceptions to Garmon preemption when the state or federal court will decide issues 'that do not threaten significant interference with the NLRB's jurisdiction.'" Hobbs v. Hawkins, 968 F.2d 471, 476 (5th Cir. 1992)(citing Windfield v. Green Div., Dover Corp., 890 F.2d 764, 767 (5th Cir. 1989)).

Garmon and its progeny are anything but black-letter law. Faced with "Congress' utter lack of guidance on this important issue [preemption by the NLRA] the Supreme Court has struggled to enunciate a governing theory and apply it in particular cases." Windfield, 890 F.2d at 766-67. Thus, the courts, under the guidance of the Supreme Court and Garmon, have struggled to define the otherwise blurry boundary between broad NLRA preemption and permissible state causes of action. Spear-heading this struggle, the Court has since refined the analytical framework established under Garmon:

> The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to (as in Garner) or different from (as in Farmer) that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the Garmon doctrine was designed to avoid.

Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180, 197-98, 98 S.Ct. 1745, 1757-58, 56 L.Ed.2d 209 (1978); see also Belknap, 463 U.S. at 510-11. "In weigh-

ing the local interest against the risk of interference, Sears considered the possible similarity between the controversies that would be decided by the NLRB and state tribunals. The determination of potential interference required a more searching comparison than merely the factual bases of each controversy. The broader inquiry into the controversies would involve an examination of the interests protected by and relief requested for each claim." Windfield, 890 F.2d at 768 (citations omitted). This freshly refined application of Garmon has been coined the "identical controversy" standard. Id. That is, if a plaintiff calls upon a state or federal court to perform an "identical inquiry" into a controversy previously placed before the National Labor Relations Board, then the claim is preempted by the NLRA pursuant to Garmon and its progeny as long as it significantly interferes with the function of the National Labor Relations Board and does not involve a matter deeply rooted in local concerns. Id. at 770. However, claims that involve conduct arguably prohibited by the NLRA may nonetheless proceed if "they do not present an 'identified controversy' to that within the Board's jurisdiction, and they involve matters that the state has a strong interest in regulating."[4] Id. With these standards in mind, this court now briefly considers automatic preemption by the NLRB and subsequently turns to each cause of action currently before it.

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[4] In deciding whether to permit state law claims to go forward, a court must avoid "the risk of inconsistent adjudication between the NLRB and state law." Windfield, 890 F.2d at 770.

4. Automatic Preemption by Prior Filing With the NLRB

Before delving in Garmon analysis of the present causes of action, this Court would first note that unions representing Plaintiffs filed three unfair labor practice charges with the NLRB claiming violations of Section 8 that address the same conduct involved in Plaintiffs' state-law claims currently before this Court. On April 14, 1998, Pipe Fitters Local Union No. 195 ("Local 195") filed an unfair labor practice charge against Bechtel alleging violations of Sections 8(a)(1),(3) and (5) of the NLRA by unilaterally eliminating established, organized work breaks and discriminatorily terminating employees because of their membership in or activities on behalf of their collective bargaining representative. *Charge 16-CA-19270-1.* On April 20, 1998, the International Union of Operating Engineers, Local 450 ("Local 450") and the Texas Laborer's District Council and Laborers 80 ("Texas Laborers") each filed similar charges against Bechtel. *See Charges i6-CA-19270-2 and 16-CA-19270-3.* On June 2, 1998, Charges 16-CA-19270-1 and 16-CA-19270-2 were amended to assert identical allegations against Mobil. The National Labor Relations Board investigated these allegations and, on July 31, 1998, refused to issue a complaint in the matter.[5] Interestingly,

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[5] All of this information is, of course, artfully omitted in Plaintiff' Third Original Amended Petition and, as such, is found as exhibits to Bechtel and Mobil's Motion for Summary Judgment. Plaintiffs' attorneys were privy to this information because they themselves filed the related unfair labor practice charges with the National Labor Relations Board. Other courts have taken such behavior as an implicit acknowledgment of the NLRB's exclusive jurisdiction

Plaintiffs' attorneys are the same attorneys who filed the unfair labor practice charges dismissed by the National Labor Relations Board.

Defendants argue, and this Court concedes, that "the Supreme Court strongly suggested that the union's filing of an unfair labor practice charge may be sufficient, in and of itself, to trigger preemption." *Bechtel and Mobil's Motion for Summary Judgment* 1; see Sears, Roebuck, & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 201, 98 S. Ct. 1745, 1759, 56 L.Ed.2d 209 (1978). Other circuits have read Sears with the same eye toward "automatic preemption." Parker v. Connors Steel Co., 855 F.2d 1510, 1517 (11th Cir. 1988)(stating that "[b]y initially pursuing relief with the NLRB the employees have implicitly recognized the Board's jurisdiction over their claims"); Davis Supermarkets, Inc. v. N.L.R.B., 2 F.3d 1162, 1178-79 (D.C. Cir.1993) (acknowledging that Sears "strongly suggested that the union's filing of an unfair labor practice charge is sufficient in and of itself to trigger preemption"). Although this Court respects the analysis of its sister circuits, it will not throw out a case on a mere "suggestion" of law--particularly when its own circuit has been silent on this possible "suggestion." Besides, Garmon analysis so clearly preempts Plaintiffs' causes of action that this Court need not rely on a tenuous suggestion of law upon which to base its decision.

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over the controversy. Parker, 855 F.2d at 1517 ("By initially pursuing relief with the NLRB the employees have implicitly recognized the Board's jurisdiction over their claims").

4. Tortious Interference and Conspiracy to Tortiously Interfere With a Contract

In counts one and two of their Complaint, Plaintiffs present claims for tortious interference with a contract and conspiracy to tortiously interefere with a contract.[6] *Plaintiffs' Third Original Amended Petition* 9-12. These claims for tortious interference with a contract and conspiracy to tortiously interfere with a contract are arguably protected or prohibited by the NLRA and, consequently, preempted pursuant to the Garmon doctrine as refined by Sears.

In Local 926, Intl. Union of Operating Engineers v. Jones the Supreme Court held that state-law actions for tortious interference with a contract and conspiracy to tortiously interfere with a contract involve conduct arguable protected or prohibited by the NLRA. 460 U.S. 669, 678, 103 S.Ct. 1453, 1460, 75 L.Ed.2d 368 (1983). There, a supervisory employee sued his union for tortious interference with a contract and conspiracy with the employer to interfere with his contract. Id. at 672. Specifically, Jones alleged that his past non-union activity generated hostility at his union and acting upon that hostility, his union's business agent retaliated against him by coercing his employer to breach its employment contract with

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[6] Under Texas law "[t]o establish a claim for tortious interference, a plaintiff must prove: (1) the existence of a contract subject to interference; (2) wilful and intentional interference with that contract; (3) the intentional interference was a proximate cause of plaintiff's damage; and (4) actual damage or loss occurred." Wardlaw v. Inland Container Corp., 76 F.3d 1372, 1375 (5th Cir.1996); Massey v. Baptist Hospital University, 902 S.W.2d 81, 85 (Tex.App.—Houston (1st Dist.]1995, writ denied).

him. Id. at 674. The Supreme Court held that, if proven, such conduct would violate the NLRA's § 9(b)(1)(A) language "which forbids a union to coerce an employer in the choice of his bargaining representative," which, consequently, would restrain employees' exercise of their Section 7 rights. Id. at 679. Since such conduct was arguably subject to Sections 7 and 8 of the National Labor Relations Act the state-law causes of action grounded upon that conduct--tortious interference with contract and conspiracy to tortiously interfere with a contract--were preempted pursuant to the Garmon doctrine as refined by Sears. See also Iron Workers v. Perko, 373 U.S. 701, 83 S. Ct. 1429, 10 L.Ed.2d 646 (1963)(claim of tortious interference with a contract preempted by Garmon); Ehredt Underground, Inc. v. Commonwealth Edison, Co., 90 F.3d 238, 241 (7th Cir.1996)(same).

Plaintiffs, along with Local 195, refused to accept the elimination of established, organized work breaks. Plaintiffs--indeed with representation by the very law firm before this Court--alleged in their charges to the NLRB that Bechtel and Mobil interfered with Plaintiffs' employment contracts because of their membership in or activities on behalf of their union in violation of Sections 8(a)(1) and (3) of the NLRA. Although Plaintiffs' prior filing of an unfair labor practice charge with the NLRB does not (necessarily) automatically preempt their state-law claims, it does indeed provide some evidence that the Plaintiffs themselves believed Bechtel's and Mobil's allegedly unlawful conduct is arguably subject to (and thus preempted by) the NLRA pursuant to Garmon doctrine as refined by Sears. Parker, 855

F.2d at 1517. If Becthel or Mobil interfered with Plaintiffs' employment contracts because of their membership in or activities on behalf of their union, as Plaintiffs themselves alleged in their charges to the NLRB, then such conduct would arguably violate Sections 8(a)(1) and (3) of the NLRA.

Pursuant to the Garmon doctrine as refined by Sears, such conduct presents an identical controversy to that previously presented to--and dismissed by--the NLRB. In dismissing the complaint, the NLRB stated "[t]he evidence shows, therefore, that the employees were engaged in unprotected activity for which they could be legitimately discharged."[7] *July 31, 1993 NLRB Letter Attachment "A"*3. These state-law claims are not merely "peripheral" to the NLRA. Quite the contrary, Plaintiffs' state-law claims for tortious interference with contract and conspiracy to interfere with contract fall deep within the roots of federal labor law under the particular facts of this case. Plaintiffs at Mobil's Expansion Project were told by C.A. Turner (at the behest of Bechtel) that

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[7] The NLRB further found that "[t]here is no evidence of union animus on the part of Bechtel of Mobil. Additionally, there is no evidence that Mobil played a role in the decision to eliminate breaks or to terminate Turner's employees." *July 31, 1998 NLRB Letter Attachment "A"* 2. Although this Court holds that Garmon as refined by Sears preempts Plaintiffs' state-law claims, it nonetheless remains interested in the preclusive effects of a National Labor Relations Board dismissal of complaint upon parties seeking state-law relief in a federal court—specifically, whether statements by the federally empowered NLRB in dismissing the complaint provide a preclusive defense against federal-court Plaintiffs who must overcome the state-law affirmative defense of legal justification. Put down those pens because those briefs, thankfully, are for another day.

they could no longer take en masse breaks. Plaintiffs continued to take en masse breaks in violation of that warning and thus were terminated from Mobil's Expansion Project by Bechtel's cancellation of its contract with C.A. Turner--a contractor now unable to staff the job with employees willing to forego en masse breaks. Plaintiffs brought unfair labor charges against Becthel and Mobil that were thrown out by the NLRB since "the employees were engaged in unprotected activity for which they could be legitimately discharged." *July 31, 1998 NLRB Letter Attachment "A"* 3. Now, Plaintiffs seek a second bite at the same, tired apple. Well, no deal. Plaintiffs are trying to recast their prior claim dismissed by the NLRB as something other than identical to the controversy currently before this Court. It is not.[8]

In support of their contention of non-preemption, Plaintiffs argue that "[t]he NLRB has unequivocally stated that the conduct which the defendant would not claim is arguable protected or prohibited by the Act is not...Therefore, since the NLRB has determined that the conduct made the basis of the union's charges is not protected or prohibited by the Act, this Court cannot now rule that the conduct is arguably protected or

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[8] In their brief Plaintiffs argue "[t]his is not a labor law case." *Plaintiffs' Response to Defendants' Bechtel, Inc. and Mobil Chemical Company, Inc., [sic] Motion for Summary Judgment ("Plaintiffs' Response")* 1. No, it's not. It's a labor law case *that the plaintiffs lost* in front of the NLRB. Now, its a transmogrified labor-law case masquerading as several state-law causes of action. Richardson v. Kruchko & Fries, 966 F.2d 153, 158 (4th Cir. 1992). This Court's task (nay, its very duty pursuant to Garmon) is to de-transmogrify the state-law causes of action to reveal the underlying labor law case.

prohibited by the Act." *Plaintiff's Response* 5. For this reason, Plaintiffs contend preemption should not occur. Plaintiffs cite this Court to a page of the Garmon decision wherein the Supreme Court noted that "the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States." Garmon, 359 U.S. 236, 245, 79 S.Ct. 773, 780, 3 L.Ed.2d 775. Seizing upon this language, the Plaintiffs advance their notion of non-preemption. This is not a novel argument. In the1949 "Briggs-Stratton case," The Supreme Court did indeed accept this argument and permit state-law causes of action to proceed since the conduct was neither protected by § 7 nor prohibited by § 8 of the NLRA. Automobile Workers v. Wisconsin Emp. Rel. Board, 336 U.S. 245, 69 S.Ct. 516, 93 L.Ed. 651 (1949). However, in 1976 the Supreme Court explored "the question of the continuing vitality of Briggs-Stratton." Lodge 76, Intl. Assoc. of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm'n., 427 U.S. 132, 151, 96 S.Ct. 2548, 2558, 49 L.ED.2d 396 (1976). After exploring the question of Briggs-Stratton's vitality, the Supreme Court announced its death: "We hold today that the ruling of Briggs-Stratton, permitting state regulation of partial strike activities such as are involved in this case is likewise 'no longer of general application.'" Id. In addition to over-ruling Briggs-Stratton, the Supreme Court further held that:

> a particular activity might be "protected" by federal law not only when it fell within § 7, but also when it was

> an activity that Congress intended to be "unrestricted by Any governmental power to regulate" because it was among the permissible "economic weapons in reserve...actual exercise (of which) on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."..."*[T]he legislative purpose may...dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulation.*"

Lodge 76, 472 U.S. at 141, 96 S.Ct. at 2554, 49 L.Ed.2d 396 (emphasis added)(quoting NLRB v. Insurance Agents, 361 U.S. at 488-89, 80 S.Ct. at 426-27, 4 L.Ed.2d 454 (1960); and quoting Hanna Mining Co. v. Marine Engineers, 382 U.S. 181, 187, 86 S.Ct. 327, 331, 15 L.Ed.2d 254 (1965)).[9] In the case currently before this Court, the NLRB found "that the employees were engaged in unprotected activity for which they could legitimately be discharged." *July 31, 1998 NLRB*

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[9] The Supreme Court further held: "Briggs-Stratton is today overruled, and...we hold further that the Union's refusal to work overtime is peaceful conduct constituting activity which must be free of regulation by the States if the congressional intent in enacting the comprehensive federal law of labor relations is not to be frustrated..." Lodge 76, 427 U.S. at 155, 96 S.Ct. at 2560, 49 L.Ed.2d 396. Thus, even though the peaceful conduct was neither protected nor prohibited by the NLRA, the Supreme Court found that the conduct was nonetheless preempted. Similarly, even though the NLRB found the conduct made the basis of this current action is neither protected nor prohibited by the NLRA, this Court similarly finds the conduct is nonetheless preempted.

Letter Attachment "A" 3. While this NLRB letter may "unequivocably" (to borrow the Plaintiffs' term) state the conduct is neither protected nor prohibited by the NLRA, it does not state that the conduct is neither *arguably* protected nor *arguably* prohibited by the NLRA.[10]

For this Court to permit Plaintiffs' state-law claims for tortious interference with contract and conspiracy to tortiously interfere with contract to proceed would violate the very core of Garmon-namely, to permit discordant state-law claims to disrupt the uniform application of federal labor law across the nation. This cuts against the very essence of Garmon and its progeny; and this Court will not launch such a piecemeal intrusion upon the National Labor Relations Act. The Fifth Circuit's reading of the previously discussed

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[10] Indeed, Plaintiffs' lawyers themselves filed unfair labor practice charges with the NLRB on behalf of the Plaintiffs' unions for the conduct made the basis of this present action. When they filed their charges with the NLRB, they obviously thought the conduct was *arguably* protected or prohibited by the NLRA. (For why else would they file complaints there?) Plaintiffs' lawyers come to this Court alleging that the same conduct is now not *arguably* protected or prohibited by the NLRA. Well, which is it? Obviously, the difficulty lies with the malleable nature of the word *arguably* injected into Garmon analysis. While Plaintiffs tend to read the *arguably* portion of Garmon analysis quite narrowly, Defendants read *arguably* quite broadly. This Court, along with a plethora of other courts, agrees with the Defendants' broad interpretation of Garmon preemption. If the Supreme Court had wanted to create only narrow NLRA preemption, then in would not have injected such an overreaching term into NLRa preemption analysis. Moreover, it would not have stood by such broad interpretation for the past forty years.

Jones case provides further guidance: "On the facts of that case, the Supreme Court appears to have concluded that the proof required for a state law claim for interference with contract overlapped too much with that for an unfair labor practice charge to alleviate a risk of inconsistent results between the state court and NLRB. The NLRB had already found insufficient evidence that the Union caused Jones's discharge." Windfield, 890 F.2d at 770 (5th Cir. 1989). Similarly, the NLRB has already found that Plaintiffs were engaged in unprotected activity for which they could legitimately be discharged. For this Court to permit Plaintiffs to recover under state-law claims for conduct inextricably intertwined with federal labor law runs the risk of interference sought to be avoided by the Garmon doctrine. Plaintiffs' state-law claims for tortious intereference with contract and conspiracy to tortiously interfere with contract are preempted by Garmon as refined by Sears. Accordingly, this Court hereby GRANTS Defendants' motion for summary judgment as to Plaintiffs' claims for tortious interference with contract and conspiracy to tortiously interfere with contract.

5. Intentional Infliction of Emotional Distress

Plaintiffs' also bring a state-law claim for intentional infliction of emotional distress against Defendants Bechtel and Mobil.[11] In Farmer v. United

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[11] Under Texas law, intentional infliction of emotional distress has four elements: 1) the defendant acted intentionally or recklessly; 2) the conduct was extreme and outrageous; 3) the defendant's actions caused the plaintiff emotional distress; and 4) the emotional distress suffered

Brotherhood of Carpenters, the Supreme Court permitted a state-law claim for intentional infliction of emotional distress to proceed despite the wide berth generally given to NLRA preemption pursuant to the Garmon doctrine as refined by Sears. 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed. 338 (1977). There, Richard T. Hill, a carpenter and member of Local 25 of the United Brotherhood of Carpenters and Joiners of America, alleged that union officials began discriminating against him in referrals to employers after a disagreement over internal union policies.[12] Id. at 292. In holding the state-law intentional infliction of emotional distress claim survived the rigorous application of Garmon preemption the Supreme Court reasoned:

> If the charges in Hill's complaint were filed with the Board, the focus of any unfair labor practice proceeding would be on whether the statements or conduct on the part of Union officials discriminated or threatened discrimination against him in employment referrals for reasons other than failure to pay Union dues. Whether the statements or conduct of the re-

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by the plaintiff was severe." McConathy v. Dr. Pepper / Seven-Up Corp., 131 F.3d 558, 564 (5th Cir.1998); Hart v. O'Brien, 127 F.3d 424, 452 (5th Cir.1997); Twyman v. Twyman, 855 S.W.2d 619, 621 (Tex.1993)(citing Restatement (Second) of Torts § 46 (1965)).

[12] Unfortunately, Mr. Hill died after the Supreme Court granted his writ of certiorari. The Supreme Court substituted Joy A. Farmer, special administrator of Mr. Hill's estate, in Mr. Hill's place. Id. at 292, fn. 1.

> spondents also caused Hill severe emotional distress and physical injury would play no role in the Board's disposition of the case, and the Board could not award Hill damages for pain, suffering, or medical expenses. Conversely, the state-court tort action can be adjudicated without resolution of the "merits" of the underlying labor dispute...The state court need not consider, much less resolve, whether a union discriminated or threatened to discriminate against an employee in terms of employment opportunities.

Farmer, 430 U.S. at 304 (citation omitted). Upon this hook many *plaintiffs* attempt to hang their intentional infliction of emotional distress claims.

At the outset, this Court notes that the Fifth Circuit has read the Farmer exception to Garmon preemption quite narrowly.[13] In Brown v. Southwestern Bell Telephone, Co., the Fifth Circuit faced a "panoply of tort and contract claims, all arising from the denial of Brown's disability benefits and from his subsequent discharge."[14] 901 F.2d 1250 (5th Cir.1990). Faced with a plaintiff waving the Farmer exception and claiming no preemption of his state tort claim of intentional

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[13] Or, stated another way, the Fifth Circuit has read Garmon preemption quite broadly. Half empty, half full.

[14] Incidentally, Random House Dictionary defines "panoply" as "1) a wide-ranging and impressive array or display; [or] 2) a complete suit of armor." Random House Unabridged Dictionary, 2d ed. (1993). This Court assumes the first definition applies in this instance.

infliction of emotional distress, the Fifth Circuit refused to allow the intentional infliction of emotional distress claim to proceed any further:

> Farmer does not hold that claims for intentional infliction of emotional distress are never preempted by the federal labor laws, but rather that such claims may escape preemption when they relate only peripherally to federal concerns...[T]he Court reasoned that abusive conduct unrelated to labor practices is wholly outside the scope of federal preemption. The Court cautioned, however, that allegedly improper labor practices cannot themselves constitute the "outrageous conduct" necessary to establish the tort of intentional infliction of emotional distress...

Id. at 1256. The Fifth Circuit has since continued its narrow interpretation of the Farmer exception. "Although Farmer noted the existence of section 301 preemption, it did not address that preemption in the context of the facts before it. We [the Fifth Circuit] have interpreted Farmer's stance on preemption of emotional distress claims narrowly." Baker v. Farmers Electric Cooperative, Inc., 34 F.3d 274, 278 fn. 4 (5th Cir.1994) (citations omitted). Indeed, the Fifth Circuit has continued to respect Garmon preemption of state tort claims despite the existence of the Farmer exception. Smith v. Houston Oilers, 87 F.3d 717, 721 (5th Cir.1996).

In fact, realizing the potential breadth of its exception carved out in Farmer, the Supreme Court itself warned:

> At the same time, we reiterate that concurrent state-court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme. Union discrimination in employment opportunities cannot itself form the underlying "outrageous" conduct on which the state-court tort action is based; to hold otherwise would undermine the preemption principle...*Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.*

Id. at 305 (emphasis added). Upon this hook many *defendants* attempt to hang their preemption defense despite the Farmer exception.

Therefore, in order for the Plaintiffs to proceed with their state-tort claim for intentional infliction of emotional distress under Farmer (and, in particular, in line with the language emphasized above), this Court must find that the claim is either 1) unrelated to employment discrimination, or 2) a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual

or threatened discrimination itself. Obviously, the Plaintiffs cannot succeed under the first prong since their state tort of intentional infliction of emotional distress is related--if not forever married to--employment discrimination. Plaintiffs, employed by subcontract C.A. Turner at Mobil's Expansion Project, took en masse breaks in violation of a directive issued by Bechtel. Faced with a subcontractor whose employees refused to follow its directive to forego en masse breaks, Bechtel terminated its contract with C.A. Turner which effectively fired Plaintiffs from Mobil's Expansion Project. Plaintiffs then filed unfair labor charges against Becthel and Mobil alleging violations of Sections 8(a)(1) and (3) of the NLRA. Specifically, the barrage of claims are as follows: On April 14, 1998, Local 195 filed an unfair labor practice charge against Bechtel alleging violations of Sections 8(a)(1),(3), and (5) of the NLRA by unilaterally eliminating established, organized work breaks and discriminatorily terminating employees because of their membership in or activities on behalf of their collective bargaining representative. *Charge 16-CA-19270-1.* On April 20, 1998, Local 450 and the Texas Laborers each filed similar charges against Bechtel. *See Charges 16-CA-19270-2 and 16-CA-19270-3.* On June 2, 1998, Charges 16-CA-19270-1 and 16-CA-19270-2 were amended to assert identical allegations against Mobil. The National Labor Relations Board investigated these allegations and on July 31, 1998, refused to issue a complaint in the matter. By initially pursuing relief from the National Labor Relations Board. Plaintiffs themselves acknowledged that their claim is related to employment discrimination. Therefore, Plaintiffs fail to escape

preemption under the first prong since their claim is related to employment discrimination.

The second prong directs this Court to determine whether the state tort is a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself. Once again, the Plaintiffs cannot succeed under the second prong since their claim for intentional infliction of emotional distress is not a function of the particularly abusive manner in which the discrimination is accomplished but, rather, a function of the alleged actual or threatened discrimination itself. Plaintiffs' Complaint offers no allegation of "particularly abusive" conduct on the part of Bechtel and Mobil. Rather, Plaintiffs simply allege: "The Defendants...wilfully and intentionally set about to cause or force C.A. Turner Construction Company to terminate its contracts of employment with Plaintiffs. Moreover, the Defendants set about to accomplish their objective my making false and misleading accusations against the Plaintiffs and disparaging the reputations of the Plaintiffs." *Plaintiffs' Third Amended Original Petition* 9. These allegations do not reveal any particularly abusive conduct on the part of the Defendants. Quite the contrary, considering the charges filed with the NLRB pointed out by the Defendants and artfully ignored by the Plaintiffs, this conduct is in fact a function of the alleged discrimination itself—namely, (effectively) firing the employees for taking en masse breaks in contravention of Bechtel's directive. The Plaintiffs' state tort of intentional infliction of emotional distress cannot be adjudicated without reference to the underlying labor

issue—whether Bechtel and Mobil were justified in (effectively) firing the Plaintiffs (which, according to the NLRB, they were). See Buscemi v. McDonnell-Douglas, 736 F.2d 1348, 1352 (9th Cir. 1984); Carter v. Sheet Metal Workers, 724 F.2d 1472, 1478 (11th Cir. 1984).

Moreover, there is a glaring Garmon preemption glitch for the "extreme and outrageous" element necessary to maintain Plaintiffs' claim for intentional infliction of emotional distress. Specifically, the NLRB has already held that "[t]he evidence shows, therefore, that the employees were engaged in unprotected activity for which they could be legitimately discharged." *July 31, 1998 NLRB Letter Attachment "A"* 3. Now, Plaintiffs ask this Court (or, more precisely, a jury) to find that the conduct of Bechtel and Mobil was "extreme and outrageous." That is, Plaintiffs ask this Court to make a finding contrary to the NLRB—that the employees were not engaged in unprotected activity for which they could legitimately be discharged and the conduct of Defendants Bechtel and Mobil was "extreme and outrageous" in firing them. Such a ruling by this Court would contradict the NLRB's finding; and Garmon analysis as refined by Sears cautions against this very danger.[15] Finally, although this Court sym-

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[15] Moreover, Plaintiffs will simply be unsuccessful in establishing the "extreme and outrageous" element necessary to support their claims for intentional infliction of emotional distress. Plaintiffs must show the conduct of Bechtel and Mobil in firing them (or having them fired by C.A. Turner) is "so extreme as to go 'beyond all possible bounds of decency,' and [is] to be regarded as atrocious, and utterly intolerable in a civilized community.'" McConathy, 131 F.3d at 564 (quoting Restatement (Second) of Torts § 46, comment d (1965)). However, the NLRB has already found that

pathizes with those employees who have labor complaints, it does not (and can not) serve as a "consolation" round for those complaints thrown out by the NLRB.[16]

It is SO ORDERED.

Signed this 19th day of November, 1998.

/s/
Thad Heartfield
United States District Judge

---

the Plaintiffs were engaged in unprotected activity for which they could legitimately be discharged. No rational trier of fact could find that an employers' termination of its employees is atrocious and utterly intolerable when those employees are engaged in activity for which they can be legitimately discharged. Subtracting the legal-ese, it's simply not extreme and outrageous conduct for an employer to fire employees whose own conduct warrants their firing.

[16] This Court realizes that Plaintiffs feel they have been wronged by Bechtel and Mobil; and it respects the position they have taken despite the ruling of the National Labor Relations Board. However, this Court also realizes that it must follow the law of Garmon as refined by Sears; and it respects the broad, preemptive jurisdiction granted to the National Labor Relations Board. In this case, the well-grounded rule of preemption must prevail.

APPENDIX C

FILED-CLERK
U.S. DISTRICT COURT
98 NOV 23 PM 4:34
TX EASTERN BEAUMONT
BY /s/_____

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

	§	
ANTHONY VOLENTINE, et al.	§	
Plaintiffs,	§	
	§	
v.	§	1:98CV1609(TH)
	§	JURY
BECHTEL, Inc. and	§	
MOBIL CHEMICAL	§	
COMPANY, Inc.	§	
Defendants.	§	
	§	

ORDER CORRECTING CLERICAL MISTAKES

Rule 60(a) of the Federal Rules of Civil Procedure provides, in part:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative

> or on the motion of any party and after such notice, if any, as the court orders.

"Rule 60(a) finds application where the record makes apparent that the court intended one thing but by merely clerical mistake or oversight did another." Dura-Wood Treating Co., Div. of Roy Q. Martin Lumber Co. v. Century Forest Industries, Inc., 694 F.2d 112, 114 (5th Cir.1982); see also In re West Texas Mktg. Corp., 12 F.3d 497, 503 (5th Cir.1994).

Pursuant to this rule, this Court, *sua sponte*, hereby makes the following corrections to its *Memorandum and Opinion Order* [29] dated November 19, 1998. The clerical mistakes contained within that order are due to mere oversight or omission. The clerk of the court is ordered to insert the following language in that order (corrections are in "bold" typeface):

Pg. 1, line 5:	"The autumn of 1996 brought together Bechtel, Inc. ("Bechtel"), Mobil Chemical **Company**--a division of Mobil Oil **Corporation** ("Mobil")..."
Pg. 2, line 12:	"manager for the Expansion Project, Sam Stoddard, sent a letter to all **Bechtel**..."

Pg. 2, fn. 1:	"Regardless, Bechtel **encourages**..."
Pg. 10, top:	"**5.** Tortious Interference and Conspiracy to Tortiously Interfere With a Contract"
Pg. 11, line 13:	"...that the Plaintiffs themselves believed **Bechtel's**..."
Pg. 11, line 16:	"...**Bechtel** or Mobil interfered..."
Pg. 12, line 10:	"...unfair labor charges against **Bechtel** and Mobil..."
Pg. 12, fn.7:	"...no evidence of union animus on the part of Bechtel **or Mobil**..."
Pg. 14, line 3:	"...a particular activity might be 'protected' **by** federal law..."
Pg. 16, line 3:	"**6.** Intentional Infliction of Emotional Distress"
Pg. 19, line 4:	"...unfair labor charges against **Bechtel** and Mobil alleging..."

It is SO ORDERED.

Signed this 23rd day of November, 1998

/s/
Thad Heartfield
United States District Judge

APPENDIX D

FILED-CLERK
U.S. DISTRICT COURT
98 NOV 23 PM 4:32
TX EASTERN BEAUMONT
BY /s/_____

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

	§	
ANTHONY VOLENTINE, et al.	§	
Plaintiffs,	§	
	§	
v.	§	1:98CV1609(TH)
	§	JURY
BECHTEL, Inc. and	§	
MOBIL CHEMICAL	§	
COMPANY, Inc.	§	
Defendants.	§	
	§	

JUDGMENT

This action came on for hearing before the Court on November 19, 1998, Honorable Thad Heartfield, District Judge presiding, on a Motion for Summary Judgment, and the evidence presented having been fully considered, the issues have been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that the action be dismissed on the merits, and that all costs are borne by parties incurring same.

It is SO ORDERED.

Signed this 23rd day of November, 1998.

/s/
Thad Heartfield
United States District Judge

APPENDIX E

NO. E158910

ANTHONY VOLENTINE, ET AL	§ IN THE DISTRICT § COURT OF §
VS.	§ JEFFERSON § COUNTY, TEXAS §
BECHTEL, INC. AND MOBIL CHEMICAL COMPANY, INC.	§ § _____ JUDICIAL § DISTRICT

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Come now, the following:

ANDERSON	HARRY	C.
APODACA	JASON	W.
ARNOLD, JR.	ARTHUR	M.
ASHCRAFT	JOE	E.
ASHER	JERRY	
BABINEAUX, JR.	NORMAN	L.
BAKER	KEN	
BAKER	MARK	R.
BALLARD	CARLO	
BEARDEN	VERNON	
BEDAIR	RANDALL	
BERTRAND	IRA	K.
BERTRAND	MICHAEL	
BIRD	DONALD	E.
BOOKER	TROY	

BOUDOIN	GLASTON	
BOUDREAUX, SR.	ALVERT	P.
BOUDREAUX, III	ALVERT	P.
BRABHAM	KIRK	
BROUSSARD	DAVID	R.
BROWN	BRYCE	K.
BROWN	JOSEPH	
BROWN	RAYMOND	L.
BRUNET	JERRY	E.
BUCHANAN	MONICA	
CAMPBELL	STEVEN	W.
CART	BRIAN	J.
CARTER	CHARLES	R.
CHAMBLES	KENNETH	
CHRISTMAN	RICHARD	
COURVILLE, JR.	JOHN	P.
CREAMER	JAMES	T.
CRYER	JOHNIE	
DARKINS	GARY	L.
DAVIS	JOHN	W.
DEAN	FRED	A.
DICKMAN	RICHARD	M.
DIXON	DOUGLAS	C.
DOMINICK	STANLEY	J.
DOYLE	JOHNNIE	M.
DUBOIS	EDD	L.
DUGAS	DONALD	G.
ELLIS	RICKY	
ENTERLINE	MICHAEL	G.
FAIR	JAMES	K.
GOBBLE	EARL	W.
GOMEZ, JR.	PAUL	G.
GONZALES	OSCAR	
GRANGER	LOUIS	D.
GRASS	MARK	
GREER	GEORGE	W.

GUADARRAMA	JOSE	F.
HALBERT	BOBBY	G.
HALL	MARK	D.
HALL	MILBURN	H.
HARE	GEORGE	M.
HATCH	MICHAEL	A.
HAYNES	KEITH	
HEAD	EDDIE	
HEMMENWAY	TYRA	
HODGE	GARY	D.
HOWELL	MICHAEL	G.
HUBERT	DANA	
JOHNSON	CURTIS	W.
JOHNSON	FRED	
JOHNSON	HARVEY	
JONES	SHANNA	
KANE	GARLAND	R.
KEEN, JR.	KENNETH	W.
KEEN, SR.	KENNETH	
KUEBODEAUX	HAROLD	W.
LAVERGNE	JIMMY	
LEBLANC	LAWRENCE	J.
LEBLANC	RHONDA	A.
LESTER	P.	K.
LEWIS	JERRY	L.
LEWIS	LONNIE	
LEWIS, SR.	THOMAS	W.
LOPEZ	ALEJANDRO	M.
MADDOX	HENRY	J.
MANN, SR.	TOMMY	J.
MAYEA	RONALD	J.
MAYS	RYAN	J.
MOAK	DAVID	M.
MOSS	HAROLD	M.
MOUTON	EUGENE	J.
MURPHY, JR.	PHILIP	R.

NESTER	STEPHEN	E.
NEWMAN	JAMES	B.
O'HAVER	DELBERT	
OCHOA	ALBERT	
OCHOA	DAVID	
ODOM	JASON	
OSWALT	JIMMY	
PARROTT	BOBBY	D.
PARROTT	JOHN	T.
PARROTT	SCOTT	D.
PEARSON	CLARENCE	J.
PEDIGO	LARRY	
PELFREY, JR.	ROBERT	E.
PHILLIPS	GARY	D.
PRICE, JR.	CURTIS	D.
PRINCE	DAVID	W.
PUCKETT	BILLY	L.
PUCKETT	JIMMY	T.
ROLLANS	ROBERT	R.
ROSE	LYNN	R.
ROSETTE	SAMUEL	
ROY	JACKIE	N.
RUEDA	RUSTY	
RUSSELL	MARK	
SCOTT	GUY	R.
SCOTT	LARRY	G.
SHUGART	BOBBY	J.
SHUTTER	TROY	M.
SINGLETARY	JOHN	A.
SKAAR, JR.	ROY	A.
SMITH	JACK	W.
SMITH	JAMES	A.
SMITH	RONALD	W.
SMITH, JR.	PERRY	D.
SOWELL	BRENDA	
SOWELL	DALE	

SOWELL	TOMMY	W.
SPIERS	EDWARD	E.
SQUYRES	WILLIAM	K.
STANLEY	JAMES	
STANLEY	JERRELL	T.
STANLEY	MASON	L.
STEVENSON	JASON	R.
STEVENSON, JR.	CLAUDIS	
STROTHER	DONALD	R.
TALBERT	JOHN	D.
TAUCER	PAUL	
TENEYUQUE	JOE	M.
THERIOT, JR.	JOHN	E.
THIBODEZUS	JEFFREY	L.
TRAHAN	GREG	
TRAHAN	MOLLY	
VOLENTINE	ANTHONY	
VAN RANDEN	JOHN	
VIZENA	ARNOLD	L.
WALLES	JOHN	
WALSON	WILLIAM	E.
WALTON	CHARLES	E.
WATSON	DONALD	W.
WEEKS	GARLAND	D.
WHITE	MITCHELL	
WHITENER	JOE	D.
WILLIAMS	DAVID	H.
WILLIAMS	STEVE	C.
WINTER	RICHARD	K.
WOMNDC, SR.	C.	A.
WRIGHT	JOHN	A.
YAKUM	STEELE	A.
ZAMBARDINO	DAMIAN	
ZERKO	FRANKLIN	D.

hereinafter referred to as Plaintiffs, complaining of Mobil Chemical Company ("Mobil Chemical"), a division of Mobil Oil Corporation and Bechtel Group, Inc., collectively hereinafter referred to as Defendants, and for cause of action would show unto the Court as follows:

I.

This is an action for tortious interference with a business relationship, specifically, a contract of employment, for conspiracy, and for the intentional infliction of emotional distress and mental anguish, and Plaintiffs seek recovery from Defendants for damages occasioned by the conduct complained of. This court has jurisdiction in as much as the amount in controversy exceeds the minimum jurisdictional limits of the Court, exclusive of costs and interests, and venue is appropriate in Jefferson County, Texas as this is where the Plaintiffs suffered the interference with and termination of their employment.

II.

Plaintiffs at all material times hereto were employed by C.A. Turner Construction Company upon the premises of Defendant Mobil located in Jefferson County, Texas.

Defendant Mobil Chemical Company is a division of Mobil Oil Corporation and a Delaware Corporation doing business in the State of Texas and has appointed Prentice Hall Corp. System as its registered agent authorized to accept service of process for this Defendant. Prentice Hall Corp. System's address is 800 Brazos, Austin, Texas

78701. Mobil can also be served by serving its Plant Manager, Chester Lee, at the Mobil Chemical Company Plant located at 2775 Gulf States Road, Jefferson County, Beaumont, Texas.

Defendant, Bechtel Group, Inc. is a Delaware Corporation doing business in the State of Texas and may be served with process through their registered agent, C. T. Corporation System. C. T. Corporation System's address is 811 Dow Avenue, Houston, Texas 77002. Bechtel Group, Inc. may also be served through its agent Bill Henry who may be served with process at 2775 Gulf States Road, Jefferson County, Beaumont, Texas.

III.

On or about April 13, 1998, each of Plaintiffs was on the premises of Defendant Mobil as an employee of C. A. Turner Construction Company, performing work pursuant to a contract between C. A. Turner Construction Company and Defendants. The Plaintiffs had worked at the Mobil facility for C. A. Turner Construction for some time prior to April 13, 1998, and expected to continue their employment with C. A. Turner Construction Company at this facility for several months. However, on that date, April 13, 1998, each of the Plaintiffs was terminated from his/her employment with C. A. Turner Construction Company at the insistence of Defendants and were excluded from the premises. Defendants has specifically sought to have C. A. Turner Construction Company void its contract of employment with Plaintiffs and refused to allow C. A. Turner Construc-

tion Company to utilize the services of Plaintiffs on the premises of Defendant, Mobil, thereby forcing C. A. Turner Construction Company to void its contract of employment with each of the Plaintiffs.

COUNT ONE

TORTIOUS INTERFERENCE

IV.

In support of their claim of tortious interference, the Plaintiffs reassert each of the factual allegations contained in paragraph III of this petition.

V.

As of April 13, 1998, and for several weeks if not months prior to said date, all of the Plaintiffs were working under a contract of employment with C. A. Turner Construction Company. The contract was for an indefinite period of time, and contemplated continued employment with C. A. Turner Construction Company for all Plaintiffs, on the premises of Mobil Chemical Company. However, due to and as a sole and proximate result of the tortious interference of Defendants, these contracts of employment were terminated by C. A. Turner Construction Company on or about April 13, 1998.

VI.

The Defendants acting through their agents/ employees willfully and intentionally set about to

cause or force C. A. Turner Construction Company to terminate its contracts of employment with Plaintiffs. Moreover, the Defendants set about to accomplish their objective by making false and misleading accusations against the Plaintiffs and disparaging the reputations of the Plaintiffs. The actions of the Defendants were motivated by malice and served no useful purpose to the Defendants.

VII.

As a direct and proximate result of the willful and intentional interference on the part of Defendants with Plaintiffs' business relationships with C. A. Turner Construction Company, their employer, Plaintiffs have all lost employment and all benefits of employment, and have been prevented from securing additional employment with C. A. Turner Construction Company. As a result, all Plaintiffs have suffered a loss of income both in the past and in the future, the total destruction of their relationship with their former employer, C. A. Turner Construction Company, and devastating damage to their reputations within the market of their chosen trade. Plaintiffs have all been seriously damaged in their ability to secure alternative employment, resulting not only in loss of income and lost earning capacity, but in serious emotional distress and mental anguish occasioned by the loss of personal esteem resulting from their lack of work or opportunity to continue to work.

COUNT TWO

CONSPIRACY

VIII.

Plaintiff would show, by the acts delineated hereinabove, each of the Defendants, together with other agents and employees of Defendants, engaged in a civil conspiracy to tortiously interfere with Plaintiffs business relationships with their employer and to disparage the reputation of the Plaintiffs, all of which was a proximate cause of Plaintiffs' damages as alleged herein.

IX.

The civil conspiracy engaged in by Defendants was entered into willfully and with wanton disregard for the rights of the Plaintiffs. The conspiracy was pursued by each Defendant with actual malice, and said conspiracy served no legitimate interest or purpose, and was the proximate cause of Plaintiffs' damages in the following particulars:

1. loss of their employment contracts with C. A. Turner Construction Company;

2. loss of employment with C. A. Turner Construction Company;

3. loss of employment opportunities;

4. loss of incomes, past, present and future;

5. personal humiliations;

6. mental anguish, emotional distress and suffering;

Plaintiffs have been damaged in sums in excess of the minimum jurisdictional limits of this Court.

X.

The conspiracy engaged in by Defendants was entered into maliciously, and with such utter recklessness as to indicate a conscious indifference to the rights of Plaintiffs. As a result, the awarding of exemplary damages is appropriate as to the conspiracy of the Defendants, and Plaintiffs request such an award in an amount found appropriate by a jury to punish the Defendants and prevent them from engaging in this type of conduct in the future.

COUNT THREE

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

XI.

The conduct referred to above engaged in by Defendants is outrageous and was intended to inflict emotional suffering and distress upon the Plaintiffs. The above alleged tortious conduct on the part of the Defendants did in fact cause the Plaintiffs to suffer from emotional distress and mental anguish in the past and Plaintiffs will con-

tinue to suffer emotional distress and mental anguish from Defendants' outrageous and unacceptable conduct in the future.

WHEREFORE, Plaintiffs respectfully request that Defendants be cited to appear and answer herein and upon final trial hereof, that judgment be awarded in favor of Plaintiffs, and against Defendants, for each Plaintiffs actual damages, to which each is entitled as a result of the Defendants' tortious interference with Plaintiffs' business relationships, Defendants' civil conspiracy to tortiously interfere with Plaintiffs' business relationships and Defendants' intentional infliction of emotional distress. Plaintiffs would pray that such damages include, but not be limited to, damages for Plaintiffs' loss of employment, loss of employment contracts, loss of job opportunities, loss of income, past, present and future, and loss of the ability to obtain employment and earn a living, mental anguish, emotional distress and suffering and further that each Plaintiff recover of and from the Defendants exemplary damages; costs of court, pre-judgment interest and post-judgment interest; and all such other and further

relief, at law or in equity, to which they may be justly entitled.

Respectfully submitted,

PROVOST ☆ UMPHREY
LAW FIRM, L.L.P.
490 Park Street
P. 0. Box 4905
Beaumont, Texas 77704
Telephone: 409/835-6000
Fax: 409/838-8888

By: /s/
Jane S. Brown
State Bar No. 00788814

Tom Swearingen
State Bar No. 19561000
PROVOST ☆ UMPHREY
LAW FIRM, L.L.P.
490 Park Street
P. 0. Box 4905
Beaumont, Texas 77704
Telephone: 409/835-6000
Fax: 409/838-8888
ATTORNEYS FOR PLAINTIFF

JURY DEMAND

Plaintiffs respectfully demand a trial by jury.

/s/
JANE S. BROWN

APPENDIX F

THE STATE OF TEXAS

No. E-0158910

ANTHONY VOLENTINE ET AL

VS.

BECHTEL INC ET AL

CITATION

172nd JUDICIAL DISTRICT COURT
of JEFFERSON COUNTY, TEXAS

To: **MOBIL CHEMICAL COMPANY**
DIV OF MOBIL OIL CORP, SERVE AGENT,
PRENTICE HALL CORP SYS
by serving at:
800 BRAZOS
AUSTIN, TX 78701

DEFENDANT:

NOTICE:

You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you. Said answer may be filed by mailing same to: District Clerk's Office, P. O. Box 3707, Beaumont, TX 77704, or by bringing it to the office. Our street address is 1001 Pearl St. and we are located on the second floor of the new annex. The case is presently pending before the

172nd District Court of Jefferson County sitting in Beaumont, Texas, and was filed on the 16th day of April 1998. It bears cause number E-0158910 and is styled:

Plaintiff:

ANTHONY VOLENTINE ET AL

VS.

BECHTEL INC ET AL

Defendant:

The name and address of the attorney for plaintiff (or plaintiff, if pro se) is:

BROWN, JANE S, Atty.,
P O BOX 4905 77704 490 PARK,
BEAUMONT TX 77701.

The nature of the demands of said plaintiff is shown by a true and correct copy of Plaintiff's PETITION (PLAINTIFF'S ORIGINAL) accompanying this citation and made a part thereof.

Issued under my hand and the seal of this court, at Beaumont, Texas, this the 17th day of April, 1998.

JOHN S. APPLEMAN, DISTRICT CLERK
JEFFERSON COUNTY, TEXAS

BY /s/_____Deputy
E. Richardson

APPENDIX G

THE STATE OF TEXAS

No. E-0158910

ANTHONY VOLENTINE ET AL

VS.

BECHTEL INC ET AL

CITATION

172nd JUDICIAL DISTRICT COURT
of JEFFERSON COUNTY, TEXAS

To: **BECHTEL GROUP INC**
SERVE REG AGENT, C T CORPORATION SYSTEM
by serving at:
811 DOW AVENUE
HOUSTON, TX 77002

DEFENDANT:

NOTICE:

You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you. Said answer may be filed by mailing same to: District Clerk's Office, P. O. Box 3707, Beaumont, TX 77704, or by bringing it to the office. Our street address is 1001 Pearl St. and we are located on the second floor of the new annex. The case is presently pending before the

172nd District Court of Jefferson County sitting in Beaumont, Texas, and was filed on the 16th day of April 1998. It bears cause number E-0158910 and is styled:

Plaintiff:

ANTHONY VOLENTINE ET AL

VS.

BECHTEL INC ET AL

Defendant:

The name and address of the attorney for plaintiff (or plaintiff, if pro se) is:

BROWN, JANE S, Atty.,
P O BOX 4905 77704 490 PARK,
BEAUMONT TX 77701.

The nature of the demands of said plaintiff is shown by a true and correct copy of Plaintiff's PETITION (PLAINTIFF'S ORIGINAL) accompanying this citation and made a part thereof.

Issued under my hand and the seal of this court, at Beaumont, Texas, this the 17th day of April, 1998.

JOHN S. APPLEMAN, DISTRICT CLERK
JEFFERSON COUNTY, TEXAS

BY /s/_____Deputy
E. Richardson

Supreme Court, U.S.
FILED
JUL 10 2000
CLERK

(2)

No. 99-1790

IN THE

Supreme Court of the United States

ANTHONY VOLENTINE, *et al.*,

Petitioners,

v.

BECHTEL, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT BECHTEL, INC.

V. SCOTT KNEESE
Counsel of Record
KEITH D. NICHOLSON
BRACEWELL & PATTERSON
Attorneys for Respondent Bechtel, Inc.
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Houston, Texas 77002
(713) 223-2900

160733

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

1894

STATEMENT PURSUANT TO RULE 29.6

Bechtel, Inc. is a wholly owned subsidiary of Bechtel Group, Inc.

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REASONS FOR DENYING THE WRIT

The sole question presented by the Petition is "whether the mere filing of charges with the National Labor Relations Board ("NLRB") requires automatic preemption of Petitioners' state-law causes of action that arise out of the same occurrence by § 8 of the National Labor Relations Act." Pet. i. Petitioners argue that the Fifth Circuit's ruling amounts to automatic preemption in any case involving a prior-filed NLRB charge. However, neither the Fifth Circuit nor the district court held, or even suggested, that the prior filing of an NLRB charge constitutes automatic preemption.

Simply put, the Fifth Circuit's ruling does not raise the question presented by the Petition and holds merely that, under *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959) and its progeny, Petitioners' state-law claims of tortious interference, conspiracy to tortiously interfere, and intentional infliction of emotional distress are preempted under the facts of this case. Petitioners' arguments fail to recognize the broad nature of the *Garmon* preemption doctrine as established by this Court. Further, contrary to Petitioners' suggestion, the Fifth Circuit's holding is not in conflict with either *Local 926, Int'l Union of Op. Engs. AFL-CIO v. Jones*, 460 U.S. 669 (1983) or *Farmer v. United Bd. of Carpenters*, 430 U.S. 290 (1977). Accordingly, the Fifth Circuit's ruling was proper in all respects and Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

I.

NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION PRESENTED BY THE PETITION

The question presented in the Petition has no basis in either the Fifth Circuit's decision or anywhere else in the record. Petitioners argue that the Fifth Circuit's ruling effectively holds that their state-law claims of tortious interference, conspiracy to tortiously interfere, and intentional infliction of emotional distress were automatically preempted due to the prior filing of a charge with the NLRB. Petitioners further assert that the holding by the Fifth Circuit requires that "all state law causes of action that would protect workers be preempted if the worker is also the member of a collective bargaining unit." Pet. 8. Such assertions could not be further from the truth.

Contrary to Petitioners' assertions, the Fifth Circuit did not hold that the prior filing of an unfair labor practice charge with the NLRB constitutes automatic preemption. Rather, the Fifth Circuit merely stated that such a prior filing based on the same facts as a subsequent lawsuit can be "influential" in finding preemption because it "strongly suggests that the controversies are the same." Pet. 12a-13a n.7 (*citing Parker v. Connors Steel Co.*, 855 F.2d 1510, 1517 (11th Cir. 1988)). Using a prior-filed unfair labor practice charge as evidence clearly does not equate to "automatic" preemption as suggested by Petitioners. Further, the district court expressly stated that it was rejecting automatic preemption as a basis for granting the motion for summary judgment because "*Garmon* analysis so clearly preempts Plaintiffs' causes of action that this Court need not rely on a tenuous suggestion of law [automatic preemption] upon which to base its decision." Pet. 28a.

II.

THE FIFTH CIRCUIT CORRECTLY HELD PETITIONERS' CLAIMS PREEMPTED ONLY AFTER A CAREFUL ANALYSIS UNDER *GARMON* AND ITS PROGENY

Thus, neither the Fifth Circuit nor the district court found that Petitioners' claims were automatically preempted. Rather, each of the lower courts engaged in a thoughtful analysis of *Garmon* and its progeny, and arrived at the same conclusion–that Petitioners' state-law claims were preempted under *Garmon* because they were arguably within the scope of the National Labor Relations Act.

A. Petitioners Fail to Understand the Broad Nature of the *Garmon* Preemption Doctrine

In determining whether Petitioners' claims were preempted under *Garmon* and its progeny, the Fifth Circuit relied on the general principles espoused in *Garmon* and its progeny such as *Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters*, 436 U.S. 280 (1978) and *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983). Specifically, the Fifth Circuit emphasized the *Sears* court's focus on whether the controversies were the same "in a fundamental respect." Pet. 10a. The Fifth Circuit also highlighted the *Belknap* court's expansion of the *Garmon* test to include analysis of not only the "central essence" of the two claims, but also the similarities in the factual bases, the interests sought to be protected, and the relief requested. Pet. 11a (*citing Belknap*, 463 U.S. at 510-11).

This Court's expansion of the "identical controversy" standard through *Sears* and *Belknap* is consistent with this

Court's desire that the scope of *Garmon* preemption remain broad. Thus, a crucial consideration in any analysis under *Garmon* is the principle that the *Garmon* preemption doctrine must be interpreted broadly. In fact, numerous other courts, including the Fifth Circuit, have recognized that the preemption doctrine espoused in *Garmon* and its progeny should be interpreted broadly in determining whether state-law claims are preempted under the NLRA. *See, e.g., Hobbs v. Hawkins*, 968 F.2d 471, 476 (5th Cir. 1992); *Platt v. Jack Cooper Transport, Co., Inc.*, 959 F.2d 91, 94 (8th Cir. 1992); *Richardson v. Kruchko & Fries*, 966 F.2d 153, 157 (4th Cir. 1992). The district court in this case explained how this Court's use of the word "arguably" in formulating the standard for preemption mandates that *Garmon* preemption be broad in nature:

> While Plaintiffs tend to read the *arguably* portion of *Garmon* analysis quite narrowly, Defendants read *arguably* quite broadly. This Court, along with a plethora of other courts, agrees with the Defendants' broad interpretation of *Garmon* preemption. If the Supreme Court had wanted to create only narrow NLRA preemption, then it would not have injected such an over-reaching term into NLRA preemption analysis. Moreover, it would not have stood by such broad interpretation for the past forty years.

Pet. 35a n.10. Consequently, Petitioners' argument for a narrow interpretation of *Garmon* is without support.

Accordingly, analyzing Petitioners' own allegations under the general principles espoused in *Garmon*, *Sears* and *Belknap*, the Fifth Circuit found that Petitioners' state-law claims for tortious interference, conspiracy to tortiously interfere, and intentional infliction of emotional distress were preempted

because they involved essentially the same claims. In arriving at this decision, the Fifth Circuit dismissed Petitioners' assertion that the case should not have been dismissed because the "Defendants' motive for interfering with Appellants' employment contracts, was disputed," holding that

> [w]hatever the motive prompting the defendants to seek the firings[1], the plaintiffs' state law and NLRB claims arise out of the same facts and at their core are essentially the same.

Pet. 16a.[2]

Therefore, the record is clear that the Fifth Circuit did not hold, either expressly or impliedly, that the prior filing of an NLRB charge constitutes automatic preemption of state-law claims. Rather, both lower courts engaged in a detailed and well-reasoned analysis of Petitioners' allegations and *Garmon* and its progeny, before arriving at the determination that Petitioners' state-law claims were preempted under federal labor law.

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1. Although it does not matter for purposes of preemption analysis under *Garmon*, Respondents dispute Petitioners' allegation that they either "instructed" C.A. Turner to terminate Petitioners, or that they made "false statements" regarding Petitioners. Pet. 4.

2. Petitioners also argue that their claims should not be preempted because they had "no bargaining, employment or contractual relationship with either of the defendants." Pet. 4. The Fifth Circuit, however, concluded that there was a "sufficient indicia of an employment relationship" between the Petitioners and Respondents such that their interaction "arguably falls under the governance of the NLRA." Pet. 13a n.8.

B. The Lower Courts' Decisions Are Not In Conflict With Either *Jones* or *Farmer*

Petitioners assert in their Petition that this case is unlike any other case in which *Garmon* preemption was found to apply. As support for this assertion, Petitioners claim that the Fifth Circuit's decision was in direct conflict with both *Local 926, Int'l Union of Op. Engs. AFL-CIO v. Jones*, 460 U.S. 669 (1983) and *Farmer v. United Bd. of Carpenters*, 430 U.S. 290 (1977). However, in finding that *Garmon* analysis, rather than automatic preemption, was the proper approach to determine whether Petitioners' claims were preempted, the Fifth Circuit relied on both *Jones* and *Farmer*, and correctly applied these cases to the present matter.

First, the Fifth Circuit analyzed Petitioners' tortious interference and conspiracy to tortiously interfere claims under *Jones*. The Fifth Circuit observed that the instant case "bears a close resemblance to *Jones* in that both the NLRB and state law claims are fundamentally the same." Pet. 12a. The Fifth Circuit stated that

> [i]n the NLRB proceeding, the unions charged that Bechtel and Mobil had forced C.A. Turner to eliminate the breaks without consulting with the respective unions, and then to fire them for continuing to take those breaks. The plaintiffs made the same claim in state court–that the defendants forced C.A. Turner to fire them for taking en mass breaks. This issue is central to both claims and would be the focus of inquiry both before the NLRB and the court reviewing the state law claims.

Pet. 12a. Further, the court stated that both controversies arose from the same set of facts (Bechtel and Mobil's conduct during the time Petitioners were terminated) and the same interests (the "right of the employees to keep their jobs after staging what amounted to an organized walkout"). *Id.* at 12a-13a (citing *Belknap*). Thus, the Fifth Circuit engaged in a thoughtful *Garmon* analysis using *Jones* in holding that Petitioners' state-law claims for tortious interference and conspiracy to tortiously interfere were preempted. Consequently, Petitioners assertion that the Fifth Circuit's ruling is in conflict with *Jones* is without merit.

In addition, the Fifth Circuit's opinion is not in conflict with *Farmer*. In determining that Petitioners' intentional infliction of emotional distress claims were preempted, the Fifth Circuit relied on *Farmer*'s holding that, in order for a state-law claim for intentional infliction of emotional distress to be preempted,

> . . . it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.

Farmer, 430 U.S. at 305. With regard to Petitioners' intentional infliction of emotional distress claims under *Farmer*, the Fifth Circuit relied on Petitioners' own allegations contained in their Third Amended Complaint:

> The conduct referred to above [in the sections setting out the tortious-interference and conspiracy-to-interfere claims] engaged in by

> Defendants is outrageous and was intended to inflict emotional suffering and distress upon the Plaintiffs. The above alleged tortious conduct [related to interference with contract] on the part of the Defendants did in fact cause the Plaintiffs to suffer from emotional distress and mental anguish.

Pet. 15a (*citing* Petitioners' Third Amended Petition). Based on these allegations, the Fifth Circuit observed that the intentional infliction of emotional distress claimed by Petitioners "is itself the actual firing, not the manner in which that firing occurred." Pet. App. 15a. Accordingly, the Fifth Circuit correctly found that the narrow *Farmer* exception did not apply and Petitioners' intentional infliction of emotional distress claims were preempted because there was a strong potential for interference with federal law. *Id.* at 15a-16a.

CONCLUSION

The foregoing illustrates that the *Garmon* analysis undertaken by the Fifth Circuit was correct in all respects and properly held that Petitioners' state-law claims for tortious interference, conspiracy to tortiously interfere, and intentional infliction of emotional distress were preempted by federal labor law. Petitioners' assertion that the Fifth Circuit's ruling requires that "all state law causes of action that would protect workers be preempted if the worker is also the member of a collective bargaining unit," is without merit. If this were the case, the Fifth Circuit and the district court would have issued much shorter opinions and analysis under *Garmon* would not have been necessary. Accordingly, Respondent respectfully requests that this Honorable Court deny the Petition.

Dated: July 10, 2000
Houston, Texas

Respectfully submitted,

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